

No. 23-2097

**In The United States Court Of Appeals
For The Fourth Circuit**

LULA WILLIAMS,
Plaintiff-Appellee

v.

MATT MARTORELLO,
Defendant-Appellant,

On Appeal From The United States District Court
For The Eastern District Of Virginia (Robert E. Payne)
(3:17-cv-00461-REP)

**JOINT APPENDIX
VOLUME VI**

Matthew William Wessler
Gupta Wessler PLLC
1900 L Street NW, Suite 312
Washington, D.C. 20036
Telephone: (202) 888-1741
E-mail : matt@guptawessler.com

Counsel for Appellee

December 6, 2023

Steven D. Gordon
Holland & Knight LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Telephone: (202) 955-3000
E-mail: steven.gordon@hklaw.com

Counsel for Appellant

Krisi Cahoon Kelly
Andrew Joseph Guzzo
Kelly Guzzo, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Telephone: (703) 424-7576
E-mail: kkelly@kellyguzzo.com
E-mail: aguzzo@kellyguzzo.com

Counsel for Appellee

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1 MS. KELLY: 37(c)(1).

2 THE COURT: All right. Let me hear from the
3 other side.

4 MR. GIVEN: Good afternoon, Your Honor. Barney
5 Given for defendant, and I'll be handling this portion.

6 A couple of things, Your Honor. I first want to
7 start with Greenberg Traurig. We have no opposition, if
8 the Court wants to issue an order asking them to produce
9 documents that they claim to have been destroyed or
10 something. That's not the case. We've not instructed
11 them to destroy anything.

12 My understanding -- and I took Ms. Weddle's
13 deposition the first time a year ago in the related case,
14 which their co-counsel in the other cases was present.
15 But long story short, I think, again, it's very clear that
16 what he says is the 20-page memo is the 11-page memo. We
17 have asked --

18 THE COURT: How do you reach that conclusion?

19 MR. GIVEN: The way I reach the conclusion is
20 I've asked Mr. Martorello. Mr. Weddle was asked. We have
21 scoured the files. There is no subsequent memo.

22 And if you look at the timing, the document she
23 referred to about a previous memo, her document at 1266-1,
24 page 14, that is a December 2012 e-mail. The 11-page memo
25 was August of 2012. And that's consistent with the

1 timeline in the e-mail that he sent to Mr. John Argyros
2 regarding valuation method.

3 I can represent to the Court we have asked if
4 there's any subsequent memo. We've asked my client.
5 We've asked Ms. Weddle. When Ms. Weddle was asked in her
6 deposition by counsel, she said she didn't recall any such
7 memo.

8 Secondly, Ms. Kelly has left out a lot of the
9 timing in the facts, and I just want to remind the Court
10 of a few things on the timing.

11 One moment, Your Honor.

12 It's on number 5. One moment. And this is just
13 a timing issue, Your Honor.

14 When the Court originally -- there was -- with
15 the orders that have been presented to the Court, there
16 was a supplemental production by Mr. Martorello.
17 Subsequent to that, the plaintiffs then withdrew their
18 motion to compel and represented to this Court that
19 Mr. Martorello had produced substantially all the
20 documents requested. That's the last thing that happened.
21 And that was years and years ago, Your Honor. And we
22 would submit that this -- this effort now to create a
23 fictional spoliation claim is not supported.

24 Secondly, you asked the direct question. All
25 they had to do is ask Mr. Martorello about this

1 memorandum. It's been 11 years, and they have never asked
2 him that question. They've had 11 years to ask him the
3 question. They chose not to.

4 THE COURT: They really haven't. They didn't
5 start the case until --

6 MR. GIVEN: Well, I'm just saying, our question
7 is one of timeliness, Your Honor, meaning they are
8 bringing this issue up now, frankly --

9 THE COURT: Yeah, but that happens in
10 litigation, particularly when it's drawn out. There's
11 been appeals. There have been two appeals in this case.
12 And that kind of thing unfortunately happens. I don't
13 like it, but --

14 MR. GIVEN: We understand that, Your Honor.
15 That's fine.

16 THE COURT: But I think the more important point
17 is what is this withdrawal that you're talking about?

18 MR. GIVEN: Well, I can tell you exactly the
19 docket number. So on April 20th, 2021 -- and it's Docket
20 Number 1082 -- plaintiffs withdrew both motions to compel
21 because, quote, Martorello voluntarily produced the vast
22 majority of the documents at issue.

23 Plaintiffs then requested that this Court deem
24 those motions as moot.

25 In an order entered on April 29th, 2021 -- I'm

1 sorry, that's Docket 1082 -- this Court entered an order
2 denying as moot both motions to compel because they were
3 withdrawn.

4 That's the last anything having to do with this.
5 And, again, since that, they have never --

6 THE COURT: And the motion that they're making
7 doesn't have to do with that. It has to do with the fact
8 that now you are offering 40-some documents that weren't
9 produced.

10 MR. GIVEN: We understand that, Your Honor.

11 THE COURT: And there isn't -- they didn't know
12 that until you offered them. So that's -- why would that
13 be untimely as an objection?

14 MR. GIVEN: No. No. I was referring to the
15 spoliation argument, not the document. I'm referring to
16 this alleged second e-mail. That's all that argument was
17 related to, not this subsequent production of documents.

18 THE COURT: Oh, I see.

19 MR. GIVEN: We agree that the 40 documents were
20 not produced in response to the request for production.
21 But again, as we're going through the -- one second.

22 Oh, I'm sorry. I'm corrected.

23 And we'll get -- we'll get -- we'll get a Bates
24 number, Your Honor. The documents were produced. They
25 just weren't listed in the interrogatory. But I will

1 provide the cite to that in the morning.

2 THE COURT: The 40 that you're talking about?

3 MR. GIVEN: The 40 that we're talking about,
4 that she's talking about.

5 So, again, other --

6 THE COURT: Well, here's the answer to the
7 question, really. If it wasn't produced, you're not going
8 to use it.

9 MR. GIVEN: Right.

10 MS. KELLY: Well --

11 THE COURT: So you have to show it was produced.

12 MS. KELLY: Judge, I think Mr. Given misspoke.
13 They were produced, but they were ordered to identify the
14 documents they're relying on for good faith basis pursuant
15 to a motion to compel we filed, and they supplemented and
16 identified the documents and they were not included as the
17 documents they were relying on. And that is our position.
18 It is not that they were not produced.

19 THE COURT: They were produced, but they didn't
20 link them to the defense.

21 MS. KELLY: Right, which is something we
22 sought --

23 THE COURT: Which was part of the order.

24 MS. KELLY: And it was part of our motion to
25 compel an order.

1 THE COURT: Then if you didn't do that, you
2 can't put them in either because you violated the order.

3 The reason that order was entered was because
4 they would know what this elusive defense was, because it
5 was elusive. And I don't know whether you were even in
6 the case at the time.

7 MR. GIVEN: Yeah, I -- and, Your Honor, I don't
8 disagree with this last characterization. They were
9 produced but not identified in response to interrogatory.
10 And I don't believe we were in the case, but we understand
11 it is what it is.

12 The last thing, Your Honor, is I wanted to
13 address the Weddle testimony. Again, I think it's a
14 mischaracterization of her --

15 THE COURT: Which -- which Weddle testimony?

16 MR. GIVEN: Well, the testimony that counsel was
17 just referring to basically saying you have to throw out
18 Weddle because --

19 THE COURT: Pardon me a minute. She referred to
20 Weddle testimony that is set out in ECF 1270, pages 4, 5,
21 and 6. That's what she was talking about.

22 MR. GIVEN: Right. And we would simply ask the
23 Court, pursuant to the Court's order, recently, timely
24 filed the deposition designations. They are substantial
25 deposition designations from Ms. Weddle that spell out in

1 detail what advice she did give. And, again, she was very
2 clear in the deposition I took. And I think in the second
3 deposition, she was engaged by Bellicose and SourcePoint,
4 not Mr. Martorello individually. We've made no secret of
5 that. And again, he was the president of those entities.
6 But for -- for counsel to suggest that she gave no advice
7 whatsoever about the nature, legality or anything of the
8 operation is just simply not true.

9 THE COURT: Well, that's what Ms. Weddle says.

10 MR. GIVEN: I just ask the Court to please read
11 her deposition designations.

12 THE COURT: Let me ask you something. Are you
13 saying that the designations that are set forth on page 4,
14 5 and 6 of ECF 1270, the questions and answers are not
15 properly set forth?

16 MR. GIVEN: No. I'm saying we made -- I'm
17 sorry. Ms. Simmons did the deposition designations.

18 THE COURT: Yes, she did.

19 "Do you ever recall providing Mr. Martorello
20 personally a legal opinion regarding his role in the
21 lending entities or with Bellicose?"

22 No.

23 N-O. I mean, it's not equivocal. How can I
24 misinterpret that?

25 MR. GIVEN: Your Honor, I can explain the

1 confusion. That -- those -- I'm not disputing that she
2 said what she said in the excerpts that counsel has
3 provided. I'm saying that's not the full picture.

4 We've served on counsel -- and again, we can
5 provide it to the Court, but it's a matter that's served,
6 not filed. The deposition designations that were served
7 very recently by Ms. Simmons included deposition testimony
8 from Ms. Weddle in the *Williams* case, and I'm saying that
9 provides a more complete picture. That's all I'm saying.

10 THE COURT: Well, it's kind of hard for her to
11 backtrack from that one. That's an absolute, unqualified
12 no.

13 So what deposition designation? Have you got
14 them?

15 MR. GIVEN: We don't have them with us today.
16 It wasn't part of the hearing. But we can certainly get
17 them printed out and bring them in the morning.

18 THE COURT: How many are they? How long are
19 they? Two pages? Five pages? Ten? What?

20 I'm not reading a whole deposition because I
21 know this. Here's what I know. I know that when I ask
22 what time it is, I get told what is the history of
23 Switzerland and how many cantons joined together to form
24 it in what year and why. And I'm not going to have
25 depositions like that.

1 If I ask what time it is, I want the deposition
2 that says it's 10:00.

3 MR. GIVEN: We will print those out, Your Honor.
4 Again --

5 THE COURT: And cut the trash from them.

6 MR. GIVEN: We will. We will provide that in
7 the morning.

8 THE COURT: That effort of litigation does not
9 obtain here.

10 MR. GIVEN: We will provide solely the
11 designation -- depo designations of Ms. Weddle.

12 THE COURT: That put in context these.

13 MR. GIVEN: Correct.

14 THE COURT: And it's going to be an interesting
15 exercise for me to read them.

16 MR. GIVEN: Okay.

17 THE COURT: Because --

18 MR. GIVEN: So yes, we'll provide those.

19 THE COURT: According to what she says here, she
20 didn't provide him information. If she didn't -- and I'll
21 tell you the other thing is if there's a conflict between
22 the two, the only thing I would think about allowing any
23 of that in is if she puts herself in that witness stand,
24 subjects herself to cross-examination, brings her
25 documents with her and stands tall. Because if she's got

1 two different views of things on the same topic, that's
2 approbation and reprobation, and we don't do that.

3 MR. GIVEN: Your Honor, I don't disagree. And
4 unfortunately --

5 THE COURT: Otherwise she's not coming. I mean,
6 she's not coming. She's not coming in. And she owes it
7 to him and to everybody to stand tall and defend what she
8 said.

9 MR. GIVEN: We have -- Your Honor, I have asked
10 her to come to trial. I think --

11 THE COURT: Don't ask her. Tell her.

12 MR. GIVEN: Okay. I'll tell her.

13 THE COURT: You tell her that her integrity has
14 been called into question by virtue of something that both
15 sides have said that she says opposite things about, and
16 the only way the Court can possibly let Mr. Martorello
17 have the benefit of anything is if she comes to testify
18 herself.

19 MR. GIVEN: I will advise her --

20 THE COURT: I'm going to preview her testimony
21 and see. I don't like what I've seen here with -- there's
22 clear testimony that you don't dispute the accuracy of in
23 which she says she doesn't advise him about anything,
24 about the legality. That's what she says, and yet you say
25 there's something entirely different than what she said.

1 MR. GIVEN: No. What I'm saying is she
2 testified -- and again, we'll produce the documents. I'm
3 saying there's a distinction between what advice she gave
4 him individually versus what advice she gave SourcePoint
5 and Bellicose.

6 And she also testified, Your Honor, that she
7 created the -- the documents that formed -- that formed
8 the entity in conjunction working with the tribal council.
9 That's all I'm saying.

10 I'm not saying that she lied on the portion they
11 were talking about. I'm saying there's just a distinction
12 between individual advice versus advice to the entities.

13 THE COURT: What difference does it make that
14 she gave advice to SourcePoint and Bellicose if it didn't
15 go to Martorello? How can he possibly rely on it?

16 MR. GIVEN: I think her testimony --

17 THE COURT: Do you see -- you say there's a
18 difference. There may not be a difference at all. It may
19 be a flight of fancy. It may be an illusion. It doesn't
20 look right to me. I've never heard of that situation.

21 Now, there are circumstances where -- and I have
22 no doubt this exists all over the country, all through
23 time -- where I am advising a corporation and I'm giving
24 the corporation advice, and the president of the
25 corporation is sitting right in the room, and I'm telling

1 it to him. That's how I'm giving it to him. In fact, I
2 did that many times in my career. But he has it. He got
3 it. He knew what was going on.

4 And if she's making a distinction about whether
5 she is advising him as opposed to the corporation and you
6 all want to make a defense on the basis of that, that
7 doesn't fly.

8 MR. GIVEN: Understood, Your Honor. We'll
9 provide the designations in the morning.

10 THE COURT: And if necessary, matters will be
11 referred to the appropriate bar association for her. I'm
12 not going to have this.

13 If, in fact, she says two different things on
14 the same topic, that's not right. That's saying something
15 under oath that's not true because one of them can't be
16 true. But I'll wait and see what designations you have.

17 MR. GIVEN: Right. That's all I'm asking,
18 Your Honor. I have nothing further. Thank you.

19 THE COURT: All right.

20 MS. KELLY: Judge, I'll be really brief.
21 Mr. Martorello had the opportunity to designate
22 Ms. Weddle's deposition transcript in his statement of
23 position of the advice he received regarding his good
24 faith basis, and there's no dispute that Ms. Weddle
25 testifies in the depositions about how she believes in

1 tribal lending and how she thinks it should work and what
2 she believes, but she does not testify that she told
3 SourcePoint, Bellicose or Matt anything. In fact, the
4 questions I asked her relate to SourcePoint, Bellicose,
5 and Mr. Martorello's liability, and those are her answers
6 on that topic.

7 THE COURT: Well, it looks like it because
8 there's questions about SourcePoint and Bellicose right
9 here.

10 MS. KELLY: And if you look at
11 Mr. Martorello's --

12 THE COURT: I'm going to give them an
13 opportunity to put -- to let me see what they are saying
14 before I make a ruling. However, I will say this. I've
15 heard you on the point that he was -- if he did not
16 identify the documents, the 40 documents to the defense as
17 was required in the order, ECF 441, paragraph 3, then they
18 are not coming in. He can't use them.

19 And the reason that provision was put in
20 there -- I didn't realize at the time we would be so far
21 away from the trial. But the reason that was put in there
22 at the time was to fix in point of time what the defense
23 was so that the discovery could be had with respect to it.

24 And so if there were to be documents that were
25 to be identified and were the basis of the defense that he

1 was offering because his answer was so amorphous, then I
2 wanted it pinned down. And that's why I did it this way,
3 and I meant it. And if they weren't identified and linked
4 to the discovery requests they were being produced to,
5 then he's not going to use them as part of his defense and
6 the good faith defense because as I understand it, they
7 all related to the good faith defense, and that is -- he
8 gave a supplemental answer on that. Where is that? Which
9 one is that? Twelve what?

10 MS. KELLY: The request is tab 5, Judge, and the
11 interrogatory I believe is tab 4.

12 THE COURT: The answer is tab 4. That's a very
13 vague response, but he didn't identify Galloway. He
14 didn't identify Gravel, and they're not going to testify
15 on the defense.

16 And the documents, the 40 documents are not
17 going to come in on the defense, if it comes in at all.

18 What motions in limine does this deal with now?

19 MS. KELLY: So that would be motion in limine
20 number 5, and then the adverse inference is motion in
21 limine number 6 of the plaintiffs.

22 THE COURT: Motion in limine 5. Have we got
23 completely -- wait a minute. Have we got all of the
24 aspects of motion in limine 5 resolved?

25 MS. KELLY: So motion in limine 5 is the --

1 THE COURT: Excuse me a minute. I just need to
2 get it.

3 All right. Motion in limine 5. What?
4 Plaintiffs' motion in limine 5. You're omnibus motion in
5 limine, that's Howard Beals. What are you talking about?

6 MR. GUZZO: It's Docket 1173 --

7 MS. KELLY: Docket 1173.

8 MR. GUZZO: -- is the motion, and then our memo
9 is at Docket 1174.

10 THE COURT: Right. And -- all right. Let's
11 see. Seventy-four. Make sure I get it.

12 All right. Five.

13 MS. KELLY: So 5 is the advice of counsel,
14 misunderstood law or good faith basis. And then --

15 THE COURT: All right. Now, where does this
16 number -- he cannot offer -- what's her name, the two
17 witnesses? Gravel and who?

18 MS. KELLY: Daniel Gravel and Jennifer Galloway.

19 MR. BENNETT: It starts at page 11, Kristi.

20 THE COURT: All right. I've got it.

21 All right. And that is also -- is that an
22 objection?

23 MS. KELLY: That's in our objection as well,
24 Judge.

25 THE COURT: Which objection?

1 MS. KELLY: That was filed at ECF 1270. It's
2 our objection to Mr. Martorello's statement of position
3 regarding his good faith basis defense.

4 THE COURT: And that's the same result?

5 MS. KELLY: It outlines the discovery issues,
6 yes. And it also discusses the --

7 THE COURT: All right. And I have to hold in
8 abeyance. I want to see what they say about the testimony
9 of Weddle --

10 MS. KELLY: Okay.

11 THE COURT: -- in the morning.

12 MS. KELLY: I just want to clarify one thing for
13 the record, Judge. The 2021 motion to compel was waiver
14 of privilege, and the Court initially ruled on that in our
15 favor and waived privilege. Mr. Martorello filed a motion
16 to reconsider, and that was pending, and we were able to
17 agree that Mr. Martorello would produce all the documents
18 in his possession that was on his privilege log, which
19 were not many because it's our position the documents were
20 destroyed. And so that resolved the motion and mooted it.

21 THE COURT: Are any of those documents at issue
22 here?

23 MS. KELLY: No, they are not identified in the
24 discovery that I'm aware of. I can go back and check, but
25 as far as I know, they are not.

1 THE COURT: All right.

2 Now, we've kind of gotten -- we started off with
3 a motion for partial summary judgment. What else are you
4 addressing here now?

5 MS. KELLY: Judge, that's all I plan to address
6 on this issue for the good faith basis, which was part of
7 the motion for summary judgment.

8 I know there are some other issues in the
9 summary judgment about sovereign immunity being available
10 as a defense that I know Mr. Guzzo wanted to address. I
11 don't know if now is the time to do that.

12 THE COURT: We've got to get some of it done.

13 MR. TALIAFERRO: I don't want to interrupt
14 Mr. Guzzo's presentation. I don't believe that we've
15 claimed sovereign immunity.

16 THE COURT: What part of the motion are you --
17 summary judgment motion are you talking about so I can get
18 it front of me?

19 MR. GUZZO: It's issue number 2, Your Honor.

20 THE COURT: Hold on, please.

21 Okay. So now -- now, we've talked about the
22 aspect of your motion for summary judgment which deals
23 with the law, right?

24 MR. GUZZO: What law --

25 THE COURT: I've ruled on what law applies.

1 MR. GUZZO: That's right, Your Honor.

2 THE COURT: All right. Wait a minute.

3 MR. GUZZO: The second issue that we move for
4 summary judgment on is that sovereign immunity does not
5 bar the claims. That was an affirmative defense asserted
6 by Martorello in his answer to the complaint. It was his
7 third affirmative defense.

8 And so on page 31 and 32 of our motion for
9 partial summary judgment briefing, we requested the Court
10 to award us summary judgment on that defense.
11 Mr. Martorello's brief did not respond to this point.

12 I'd also note --

13 THE COURT: It's affirmative defense number
14 what?

15 MR. GUZZO: Three.

16 THE COURT: Spell 3 or number?

17 MS. KELLY: Number 3.

18 THE COURT: All right. Sovereign immunity, and
19 they didn't respond. They don't oppose. So it's granted.
20 Is that right?

21 MR. TALIAFERRO: That's correct, Your Honor, we
22 don't oppose --

23 THE COURT: All right.

24 MR. TALIAFERRO: -- that aspect.

25 THE COURT: We also have had argument on the

1 mistake of law and scienter. We're going to have some
2 more on that. So that's in the open right now.

3 What else about your summary judgment?

4 MR. GUZZO: Then, Your Honor, we also moved on
5 several elements of our claim.

6 THE COURT: All right. Let's go to those.

7 MR. GUZZO: And that starts on page 32 of our
8 brief and then continues through 40. And what we did here
9 is we went through the substantive elements of the claim
10 that Mr. Martorello --

11 THE COURT: This is section 1962(d) claim?

12 MR. GUZZO: (d) claim.

13 THE COURT: What count is that?

14 MR. GUZZO: That is Count Three of the
15 complaint.

16 And if you see, we, in our brief, starting at
17 32, we argue that summary judgment should be granted, that
18 Mr. Martorello violated 1962(d) as to plaintiffs and the
19 class members. And we go through the evidence that it
20 can't be disputed that he knew about it, that the evidence
21 shows and it can't be disputed that Mr. Martorello
22 furthered the scheme and accepted millions of dollars in
23 benefits from it.

24 In addition, we argued that summary judgment
25 should be awarded that an enterprise existed -- that

1 starts on page 36 of our brief -- that the loans
2 constituted unlawful debt under RICO.

3 THE COURT: Wait a minute. Wait a minute.

4 MR. GUZZO: Sorry. I'm going fast. And that
5 persons associated with the enterprise engaged in the
6 collection of unlawful debt.

7 So our analysis argument in evidence is
8 submitted there.

9 And Mr. Martorello --

10 THE COURT: Well, is there any -- the definition
11 of unlawful debt under RICO is, you said, 21 percent?

12 MR. GUZZO: Well, the definition is that --

13 THE COURT: Twice the state rate.

14 MR. GUZZO: Twice the state. And that's at
15 18 U.S.C. Section 1961(6).

16 The debt has to be usurious under state or
17 federal law where the usurious rate is at least twice the
18 enforceable rate. And under 6.2-303 of the Virginia Code,
19 that is what establishes the rate in Virginia is
20 12 percent.

21 And, Your Honor, there's no dispute in this case
22 that the loans far exceeded 24 percent, far exceeded even
23 100 percent. The parties have received a stipulation as
24 to the class member data on this.

25 It's also in the expert report of Karl Ebert,

1 and it's in Exhibit 56. So Docket 1166-56, paragraphs 42
2 through 45. The average APR charged on these loans was
3 727 percent in this case.

4 THE COURT: All right.

5 MR. GUZZO: And so for those reasons, we would
6 submit, for the reasons in our brief that weren't opposed
7 on these grounds, that all of these elements of the claim
8 are satisfied.

9 THE COURT: You say that there's no opposition
10 to any of your positions on these points?

11 MR. GUZZO: Correct, Your Honor. They did not
12 respond. Their whole brief really was devoted to that --
13 to their point that we needed to prove knowledge.

14 THE COURT: All right.

15 MR. GUZZO: But they didn't say -- they didn't
16 contest that an enterprise exists or that the loans
17 constitute unlawful debt or that Mr. Martorello knew or
18 furthered the scheme.

19 And so under Rule 56(c), and one of the cases we
20 cite in our reply brief, Azko, A-Z-K-O, we would submit
21 that those matters are uncontested and that summary
22 judgment should be granted on those elements, thereby
23 really reducing the trial to several issues, primarily
24 damages.

25 THE COURT: All right. I'll hear from the

1 defendant at this time.

2 The way I read the papers, I didn't see contest
3 to those things. So help me out, where we stand from your
4 standpoint. Who's going to do that, Ms. Simmons or
5 Mr. Taliaferro or Mr. Given?

6 Is my reading correct, and his assertion, that
7 you all did not respond to those particular points?

8 MS. SIMMONS: Your Honor, the -- the first basis
9 was the question of whether or not the debts were
10 unlawful. The Court has ruled on that. So we're not --
11 because Virginia law applies, we are not disputing that
12 the debts were unlawful. The Court has found that, that
13 Virginia law applies. So that's correct. We're not
14 arguing that it does.

15 THE COURT: So I ought to have summary judgment
16 on that?

17 MS. SIMMONS: Yes.

18 THE COURT: He said that Mr. Martorello knew
19 about the scheme, that you didn't contest that. Let's
20 see. That would be at page 32 through -- excuse me,
21 through 33 and 34. And I didn't see any opposition about
22 that in the brief either. So I've taken that Rule 56(c)
23 will kick in. Am I right or wrong?

24 MS. SIMMONS: Your Honor, we are not taking the
25 position -- well --

1 THE COURT: Let's start again. The first
2 question is am I correctly reading your papers that you
3 did not address their contentions that Mr. Martorello knew
4 about the scheme, that he acted in furtherance of the
5 scheme, that he knew the enterprise existed, that the
6 loans constituted unlawful debt, and that persons engaged
7 in the collection of unlawful -- persons in the enterprise
8 engaged in unlawful debt collection? I didn't see any
9 dispute sections in your brief challenging that. Am I
10 right?

11 MS. SIMMONS: So we are not disputing that they
12 have shown the existence of an enterprise. We do not
13 agree that they have shown the existence of a scheme,
14 which we submit would require the knowledge of
15 unlawfulness, the willfulness element that we've been
16 discussing today.

17 THE COURT: Okay. And -- so this depends on
18 willfulness?

19 MS. SIMMONS: Correct.

20 THE COURT: And I guess furtherance of the
21 scheme argument that they make likewise does that, right?

22 MS. SIMMONS: Right.

23 THE COURT: And you agree the loans constitute
24 an unlawful debt under Virginia law and 18 U.S.C. 1961(6).

25 MS. SIMMONS: Given the Court's ruling earlier

1 today, yes.

2 THE COURT: And you agree that they're entitled
3 to summary judgment on persons associated with the
4 enterprise engaged in the collection of a debt?

5 MS. SIMMONS: Correct.

6 THE COURT: Okay.

7 MS. SIMMONS: We don't dispute that the debts
8 were collected.

9 THE COURT: And the -- so summary judgment can
10 be entered on those points, but not until -- I can't do
11 anything on the scheme arguments until I hear further from
12 you on this willfulness, right?

13 MS. SIMMONS: Correct, Your Honor.

14 THE COURT: Okay. All right. I understand.

15 All right. So that solves that. What's next?

16 It's 4:15. We're going to 5, and then we're going to
17 knock off. We're not going Norfolk hours. I used to
18 start at 8 and quit at 8. No longer do that.

19 MR. GUZZO: Just one point of --

20 THE COURT: Where do we go?

21 MR. GUZZO: Sorry. Go ahead.

22 THE COURT: Where do we go? What do we do next?

23 They say that given the rulings that I've made,
24 that you're entitled to summary judgment that

25 Mr. Martorello knew the enterprise existed, that the loans

1 constituted unlawful debts, that the persons associated
2 with the enterprise engaged in the collection of unlawful
3 debts. They say I cannot grant summary judgment on the
4 first part about that he knew about the scheme or that he
5 furthered the scheme, the second point, because the
6 willfulness issue is still outstanding.

7 Have I said that right, Ms. Simmons?

8 MR. TALIAFERRO: Yes, Your Honor.

9 THE COURT: Mr. Taliaferro. Okay.

10 So what do you say?

11 MR. GUZZO: Well, I would say I thought they
12 were just a little hung up on the word scheme because they
13 don't agree that --

14 THE COURT: That's a bad sounding word.

15 MR. GUZZO: I think it's an accurate sounding
16 word in this particular case, Your Honor.

17 So I would say is that the knowledge element
18 that he knew of the nature of the enterprise and the
19 unlawful debts and the evidence further showing him
20 facilitating that -- I mean, I just hear them taking issue
21 with the word scheme and then injecting a third element,
22 whether we have to prove willfulness, not that they
23 necessarily oppose that he knew about it and that he
24 facilitated it --

25 THE COURT: I don't think that you oppose the

1 record that shows beyond dispute that Mr. Martorello knew
2 what was going on with the whole lending program.

3 MR. TALIAFERRO: That's correct, Your Honor. We
4 don't dispute that.

5 THE COURT: And you don't dispute that
6 Mr. Martorello furthered the whole lending program by what
7 he did. He did it. I mean, he set the thing up. It's
8 undisputed he set the thing up. It's undisputed that he
9 provided the people. It's undisputed that he had the
10 servicers. It's undisputed that they did the leads. It's
11 undisputed they did the collections. I don't know what
12 the dispute is, if there is one, about --

13 MR. GIVEN: Your Honor, I think -- I apologize.
14 I think the dispute is that we will produce evidence that
15 Mr. Martorello did not set it up, that it was actually set
16 up prior by Mr. Rosette. It's a December memorandum that
17 preceded Mr. Martorello's involvement.

18 So that's where we do take some issue about him
19 being the mastermind or setting it up. Mr. Rosette set it
20 up.

21 THE COURT: He set it up at Martorello's
22 insistence.

23 MR. GIVEN: That's not what I think the evidence
24 will show, Your Honor. We disagree with that part.

25 THE COURT: Okay. So there's a factual dispute

1 about that. Where is the factual dispute, then?

2 MR. GIVEN: That the --

3 THE COURT: Where is the evidence of the factual
4 dispute? They say that Martorello was responsible for it.

5 MR. GUZZO: Well, I'll sit down and I'll --

6 THE COURT: He furthered it. It doesn't make
7 any difference that he set it up.

8 MR. GUZZO: And that would be my point,
9 Your Honor.

10 THE COURT: Their point is -- they're not
11 arguing that he set it up. Although it seems to me, if I
12 recall correctly, yeah, Rosette was the lawyer who did it,
13 but there was a reason behind all that and that was
14 because Martorello basically told him to after he
15 discovered what a bonanza it was.

16 But apart from that, they're not arguing about
17 that. They're saying that he furthered it, that there's
18 no dispute that he furthered the operation.

19 MR. GUZZO: That's correct, Your Honor.

20 THE COURT: I don't think there's any dispute on
21 that, is there?

22 MR. TALIAFERRO: It may just be late in the day,
23 Your Honor. We're having a little trouble finding where
24 the -- what the citation -- what we're looking at for the
25 requirement that Mr. Martorello furthered --

1 THE COURT: Well, the argument, he tells me, is
2 1169, pages 33 -- excuse me, 34, 35 and 36. That's their
3 opening summary judgment brief. And then it's further
4 addressed in the reply at what pages? Your reply,
5 Mr. Guzzo. I don't know that you follow the same outline.

6 MR. GUZZO: In the reply, which is 1244, it
7 starts on page --

8 THE COURT: 1241.

9 MR. GUZZO: I'm looking at the unredacted
10 version, but yes, 1241 would be redacted version, and the
11 page number wouldn't change.

12 THE COURT: Well, let me tell you something. If
13 it's the 1241 and it's the redacted version, you didn't
14 redact anything. There's not any redaction in mine, or if
15 you did, I can't find it.

16 I'm not sure that there's a reply to any of that
17 stuff in there in the same organizational format because
18 you address the legal issues. Maybe -- do you reply to it
19 in -- wait a minute. There is one redaction. Page 5.

20 Is it the response to the counter-statement
21 or --

22 MR. GUZZO: No. And so I want to direct
23 Your Honor to page 27. And then there's a separate
24 heading --

25 THE COURT: Twenty-seven of what?

1 MR. GUZZO: Of the reply brief.

2 THE COURT: All right.

3 MR. GUZZO: So a lot of the reply brief involves
4 the new issue that was injected by Mr. Martorello of
5 whether actual knowledge applies.

6 THE COURT: Yeah.

7 MR. GUZZO: Then we have a section, "Other than
8 his erroneous mistake of law defense, Mr. Martorello does
9 not oppose that he knew and agreed to facilitate" -- we
10 say "scheme." I'll say program for the purpose of this.

11 THE COURT: Enterprise.

12 MR. GUZZO: The enterprise. And we go through,
13 which tracks our earlier brief, that the elements that he
14 knew were met and that it's not a high bar, and that he
15 does not and cannot contest that he knew about it.

16 And then on page 28 --

17 THE COURT: Yeah, I see it.

18 MR. GUZZO: -- we start -- there's a separate
19 heading, "Martorello did not respond to plaintiffs'
20 request for summary judgment, that an enterprise existed,
21 the loans constitute unlawful debt, and persons engaged in
22 the collection of the unlawful" --

23 THE COURT: Well, they agree with that.

24 MR. GUZZO: Yeah. And so I'm just pointing
25 that --

1 THE COURT: They haven't disputed that.

2 MR. TALIAFERRO: I appreciate Mr. Guzzo's
3 further explanation. That's correct.

4 THE COURT: Okay.

5 MR. TALIAFERRO: The recitation that the reply
6 brief accurately states defendant's position, which is
7 other than the willful issue, the scienter issue that we
8 already discussed, we did not dispute the remainder of
9 that paragraph.

10 THE COURT: All right. Okay.

11 I know what to do now. So what do we do next?

12 MR. GUZZO: That's all I have, Your Honor.

13 Also, I know you've scheduled this hearing accommodating
14 my schedule. I know you were looking at it last week, and
15 I forgot to thank you when this all started. So I wanted
16 to thank you for that.

17 THE COURT: All right. We try to respect
18 vacations. Lawyers get precious few of them. I hope you
19 went somewhere fun and did something good.

20 MR. GUZZO: I was in Wyoming in the Grand Tetons
21 with -- I have a 4-year-old and a 1-year-old. So it was
22 actually our first real family vacation. So it was really
23 nice. So thank you. Gave me a lot of time to think about
24 this, though.

25 THE COURT: At your age, I probably would have

1 considered it to be wonderful to be with my 4-year-old and
2 my 1-year-old. At my age, it wouldn't have been a
3 vacation.

4 MR. GUZZO: Times have changed.

5 THE COURT: Well, I got great grandchildren that
6 age, and they wear me out.

7 Okay. What's next on our Docket here, folks?

8 MS. KELLY: Judge, the next item I believe are
9 motions in limine, and I think there are some discrete
10 ones that we could resolve --

11 THE COURT: Well, I'm pulling the notebook out.
12 I spend more time moving notebooks.

13 MS. KELLY: I think it's 1174, plaintiffs'
14 motion in limine.

15 THE COURT: All right. Plaintiffs' motion in
16 limine. The motion in limine number 1, I've issued orders
17 on those. We're not hearing argument. So which one are
18 we hearing argument about?

19 MS. KELLY: So we had motion in limine number 2
20 and 3 were both outstanding, but I think the defendant,
21 Mr. Martorello, and plaintiffs agree that both of those
22 were resolved by Your Honor's ruling as to the Virginia
23 law -- that Virginia law applied here.

24 THE COURT: Do you agree?

25 MR. GIVEN: Well, Your Honor, I -- we do have

1 one thing is that --

2 THE COURT: All right.

3 MR. GIVEN: -- on number 2 -- we agree number 1,
4 there was no opposition there.

5 Number 2, we -- obviously, the Court has ruled
6 that Virginia law applies, but we still believe,
7 notwithstanding the Court's ruling, that the loans were
8 made on the reservation. That's the only distinction, and
9 that's -- we believe they were made on the reservation.

10 THE COURT: But the ruling on applicable law
11 solves that. You're not agreeing to anything.

12 MR. GIVEN: Correct.

13 THE COURT: I ruled against you on that.

14 MR. GIVEN: Okay. Then that's disposed of.

15 THE COURT: I just want to know if it's disposed
16 of. I'm not trying to get you to agree to what you fought
17 so hard to oppose.

18 MR. GIVEN: And the Court has now disposed of
19 motion in limine number 3, based on its ruling this
20 morning.

21 THE COURT: All right.

22 MR. GIVEN: I don't believe that -- oh, go
23 ahead, Kristi.

24 THE COURT: No. Go ahead.

25 MR. GIVEN: I can get rid of a lot of them,

1 Your Honor. Their motion in limine number 4 -- okay.

2 Yeah. Go ahead, Kristi.

3 THE COURT: This has to do -- this -- as I read
4 it, I didn't quite follow it, but then I got into the
5 motions. This has to do with expert testimony, doesn't
6 it?

7 MS. KELLY: Judge, so this motion is to exclude
8 testimony that federal policy supports the commercial
9 activities that --

10 THE COURT: I know. So who's going to put that
11 on?

12 MS. KELLY: So we can raise it in a motion in
13 limine -- we can address it in a motion in limine and it
14 would dispose of some of the expert testimony or we could
15 hear it with the motions in limine to exclude specific
16 experts who are opining in this.

17 Judge Orrick in the *Brice* case excluded the
18 expert testimony of Mr. Henson and stated that federal
19 policy encouraging American Indian economic development
20 and self-sufficiency was excluded because it was not
21 directly relevant to the resolution of the claims.

22 And so plaintiffs don't believe Mr. Martorello
23 should have testimony that he did this because the federal
24 policy and federal law supported what he was doing because
25 we, in fact --

1 THE COURT: Do you think he's going to put on an
2 argument that he's doing this for the eleemosynary purpose
3 to advance the tribe's welfare? I can't believe it.

4 MS. KELLY: Well, he --

5 THE COURT: Are you all offering any testimony
6 on this topic?

7 MR. TALIAFERRO: Your Honor, I think this is --
8 the advancement of tribal policy was related to our choice
9 of law issue.

10 THE COURT: Yes, I think it was.

11 MR. TALIAFERRO: And I believe that's been
12 resolved.

13 THE COURT: I think so, too. And Judge Orrick's
14 opinion in *Brice* clearly deals with it as well. So this
15 motion in limine is granted. An order will be entered.

16 MS. KELLY: Thank you, Judge.

17 The -- the next one is the advice of counsel.

18 THE COURT: Your view -- just so I understand
19 it, your concession is that it's wrapped up in the law
20 part of things?

21 MR. GIVEN: Correct.

22 THE COURT: Right. Not necessarily the expert's
23 view of it.

24 MR. GIVEN: Correct.

25 THE COURT: So anyway, it's granted. This one,

1 as this motion is put, it is granted as moot.

2 MS. KELLY: Okay.

3 THE COURT: I think that the expert testimony on
4 the topic will fall as well because of what Judge Orrick
5 did in the *Brice* case.

6 All right. Moot because of law ruling.

7 All right. Next one is Martorello should be
8 prohibited from asserting a suggestion that he relied on
9 the advice of counsel, misunderstood the law or had a good
10 faith basis to believe his conduct was illegal.

11 We have still matters pending on that, and I'll
12 hold that in abeyance.

13 Number 6 is any adverse inference instruction
14 should be provided to the jury. You probably mean "an"
15 adverse inference, right?

16 MS. KELLY: That's correct, Judge.

17 THE COURT: And that's destruction of highly
18 relevant documents. And that's -- that is what, now? Are
19 you ready to address that?

20 MS. KELLY: Yes, I can.

21 THE COURT: All right.

22 MS. KELLY: And I would just -- to start, I
23 would like to address, if Your Honor goes -- well, first,
24 stepping back, it's our position that documents were
25 destroyed in this case and --

1 THE COURT: Well, is there any dispute that the
2 documents were destroyed? I thought that Ms. Weddle said
3 that all the documents were destroyed.

4 MS. KELLY: So stepping back, I first --
5 Mr. Martorello, when he sold his business to the tribe,
6 he -- before he sold it, there's an e-mail with his lawyer
7 regarding the sale transaction -- John Williams -- where
8 he says he's going to remove stuff before the sale. Then
9 John Williams responds, you know, it's also a good idea to
10 have the tribe create a document destruction policy so
11 that they have cover if federal regulators come later and
12 documents are missing.

13 THE COURT: Nothing wrong with that.

14 MS. KELLY: That's fine. But the problem
15 becomes, Judge, when the sale documents insert a provision
16 that -- which if you look at Exhibit 7, it's ECF 1174-7.

17 THE COURT: It's the contractual provision.

18 MS. KELLY: That's right, Judge. And that
19 provision states that "all company information now or that
20 may be discovered on equipment of any kind or in any
21 written materials shall be immediately provided to the
22 acquirer" -- which was the tribe -- "and deleted or
23 destroyed by the holder so holder retains no information
24 of the company."

25 So Mr. Martorello sold the information about

1 Bellicose/SourcePoint to the tribe, made them destroy it
2 all. He didn't want to, in my opinion, get his hands
3 dirty and be the one pushing delete, but he had the tribe
4 do it for him.

5 And then in discovery, when we were doing
6 jurisdictional discovery with the tribe --

7 THE COURT: When was the destruction?

8 MS. KELLY: This has been ongoing throughout the
9 case. That's why -- we knew that there was e-mails
10 deleted early on in the case because Mr. Gray told us
11 that. When we asked why there were no e-mails with
12 Mr. Martorello, he said that they were all destroyed.

13 THE COURT: Who said that?

14 MS. KELLY: Justin Gray, counsel for Rosette,
15 who was counsel for the tribe. And we --

16 THE COURT: But the litigation started in '17.

17 MS. KELLY: That's right.

18 THE COURT: When was the sale?

19 MS. KELLY: It was -- it was finalized at the
20 end of 2015, early 2016.

21 THE COURT: Okay.

22 MS. KELLY: And so the destruction occurred in
23 early 2016 is my understanding.

24 THE COURT: Okay. So how does he have a duty to
25 preserve the documents at that time?

1 MS. KELLY: Because it's our position that
2 Mr. Martorello knew that there was a threat, a real threat
3 of ongoing litigation because he was aware that federal
4 regulators were issuing CIDs, certain state Attorney
5 Generals were filing lawsuits. I believe the
6 Pennsylvania --

7 THE COURT: Issuing what?

8 MS. KELLY: CIDs, like civil investigative
9 demands. And the state Attorney General in Pennsylvania,
10 I think, had sued Think Finance at that time as well. And
11 so he was aware -- and the reason why he sold the
12 business --

13 THE COURT: When is Otoe? When was that?

14 MS. KELLY: The District Court decision was in
15 2013, and the Second Circuit affirmed the decision in
16 2014. So this was all before --

17 THE COURT: So he knew about actions by the
18 state AGs.

19 MS. KELLY: That's correct.

20 THE COURT: He knew about Otoe litigation and
21 all that.

22 MS. KELLY: And he knew about Scott Tucker's
23 indictment. He knew about the Hallinan indictment.

24 THE COURT: Who?

25 MS. KELLY: Charles Hallinan. He was an

1 individual who was criminally prosecuted in Philadelphia
2 for a similar lending scheme.

3 THE COURT: Had the prosecutions concluded by
4 '17?

5 MS. KELLY: No, but Tucker was done in 2017.

6 THE COURT: All right. What else?

7 MS. KELLY: He was aware of the CashCall
8 litigation, and he -- there's e-mails where he said he was
9 concerned about a CashCall-type attack on his operation.
10 And so that was the reason for the sale.

11 The CFPB had also sued the tribal lending
12 entities that were --

13 THE COURT: He knew about the risk of litigation
14 from the 1166-3.

15 MS. KELLY: That's correct, Judge.

16 THE COURT: That's 2012?

17 MS. KELLY: Yes. Yes.

18 THE COURT: So I guess the question I have here
19 is if you want this inference, the inference has to come
20 how? How am I going to do it? And what does he get to
21 say about it in response?

22 So to the extent that you want an adverse
23 inference based on his knowledge about what was going on
24 in the industry and people getting indicted, and so forth,
25 because that has to do -- you know, the spoliation of

1 evidence has to do with the destruction of evidence of
2 value, the question to me then becomes what does he get to
3 put on in response to all that and say no, I didn't do it
4 because of that, I did it because I got this -- I got the
5 advice from a lawyer this was a good way to do business?

6 MS. KELLY: Well, we asked him why that
7 particular section, section 2.6(d) was included in the
8 contract, and he says it was just a form contract and part
9 of the document.

10 And then when we obtained the actual document
11 that it was based on in the *Hengle* case, that section was
12 missing. And so that section was added, and it wasn't
13 part of the form document.

14 And when we asked his lawyer, John Williams,
15 about it, he refused to answer on the basis of privilege
16 as to why that was included in this contract and not the
17 other form contract.

18 So --

19 THE COURT: So I guess the question still is --
20 this is one of those issues of what does this open up?

21 MS. KELLY: Judge, if you would --

22 THE COURT: I do think the rule is -- help me if
23 I'm wrong -- that when you're charged with spoliation, the
24 test includes you have to make a finding, if you're going
25 to give a spoliation instruction, that he reasonably

1 anticipated litigation. That opens up the whole bailiwick
2 of what he knew at the time. So I don't know --

3 MS. KELLY: If you would permit us, Judge, to
4 confer.

5 THE COURT: Do you all want to pray over that
6 tonight?

7 MS. KELLY: Yes, I would like to, Judge.

8 THE COURT: I think that would be a good idea.

9 MS. KELLY: I was going to suggest allowing us
10 to confer about this, and your decision on the good faith
11 basis may inform that as well.

12 THE COURT: Seven has been -- they don't object
13 to that.

14 MR. GIVEN: That's correct.

15 THE COURT: Eight. They don't object to that.

16 MR. GIVEN: As to the RICO element, that's
17 correct.

18 THE COURT: Yes.

19 Nine, motion to exclude evidence that Martorello
20 was not the lender. Are you contending that he personally
21 was the lender?

22 MS. KELLY: No, Judge. That -- I will say I
23 could have done a better job drafting that, and our intent
24 was we just want to exclude Mr. Martorello from asserting
25 a defense to the case that he was not the lender so he

1 can't be liable joint and severally for lending laws. And
2 I don't think there's a dispute about that.

3 MR. GIVEN: There's a huge dispute about that,
4 Your Honor. We -- we're going to show who the true
5 lenders were. They were Red Rock Tribal Lending and Big
6 Picture Loans that Mr. Martorello did not own. So that's
7 something that's a fact issue and will be brought before
8 the jury. We absolutely assert that he was not the
9 lender.

10 THE COURT: In this case, what difference does
11 it make that he was not the lender? I don't know that --

12 MS. KELLY: I'm sorry. We agree that he was not
13 the lender. What I'm saying is we don't want him to use
14 that to say only the lender could be liable under joint
15 and several liability. So I thought we were kind of
16 agreed on that as long as --

17 MR. GIVEN: No. Because it involves Virginia
18 state law, which is now at issue, our Virginia counsel
19 will address that.

20 MR. TALIAFERRO: Your Honor, this goes to the
21 Virginia statutory provision. We think there's a case
22 directly on point that limits liability to the actual
23 lender on the Virginia counts.

24 And we're reluctant to agree that he's not the
25 lender because we think that liability, under Virginia

1 law, is limited to the lender.

2 THE COURT: Well, I don't think -- his RICO
3 liability is because of the association with the
4 enterprise and his involvement in it, not because he was
5 the lender. And he -- I think it's not disputed that he
6 was the principal shareholder and managing person of
7 SourcePoint and Bellicose. Who was the lender? Who
8 actually loaned the money?

9 MS. KELLY: So Mr. Martorello actually had a
10 company that lent the money for the loans under the name
11 of the tribe, through Iron Fence Investments. He funded
12 the loans.

13 THE COURT: Wait a minute. He had - Iron Fence.

14 MS. KELLY: Which funded the loans.

15 THE COURT: Loaned the --

16 MS. KELLY: Money to the tribe.

17 THE COURT: What entity?

18 MS. KELLY: To Red Rock -- I'd have to --

19 THE COURT: To Red Rock and SourcePoint or who?

20 MS. KELLY: I think -- I would have to
21 double-check the documents to the entity that Iron Fence
22 lent the money to. It might have been the tribe directly
23 to fund the loans, and he had --

24 THE COURT: Iron Fence was a company or LLC or
25 what?

1 MS. KELLY: It was a company that's still, I
2 think, owned by Mr. Martorello. I'm not sure if it was an
3 LLC or another corporate structure. But he had that
4 company that funded the loans. He had his marketing
5 company, 7X Services, and he had SourcePoint and Bellicose
6 that serviced the loans. So he had different companies
7 that dealt with different aspects of the lending
8 operation.

9 THE COURT: Are you contending, insofar as your
10 claim under the Virginia statute, it's the -- which
11 statute is it?

12 MR. TALIAFERRO: Your Honor, it's the *Greenberg*
13 *v Commonwealth of Virginia*. I'm going to have to put my
14 reading glasses on.

15 THE COURT: Which claim is it?

16 MR. TALIAFERRO: 25 Va. 594, 1998, Your Honor.
17 We contend that case is clearly on point. It limits
18 liability under the Virginia statute to the lender. We --
19 if you look at our response to number 9, we acknowledge
20 that it's probably not an issue for the RICO claim.

21 THE COURT: Yeah, which appears to be what it
22 relates to.

23 MR. TALIAFERRO: We just want to be --

24 THE COURT: I mean, their paper -- their page 27
25 only mentions it in connection with the RICO claim, as I

1 read it. It's late in the day.

2 MR. GUZZO: If Your Honor -- I could just
3 clarify the decision in *Greenberg*, as well as with what
4 the Virginia code says. This is going to be fully briefed
5 in opposition to Mr. Martorello's motion for summary
6 judgment. So you're going to get a full brief on this
7 tonight. I know you probably won't take a look at it
8 tonight.

9 THE COURT: No, I won't. Okay. We'll check it.

10 MR. GUZZO: There is two -- well, there's a
11 variety of different lending statutes in Virginia. One is
12 Virginia's general usury statute. That comes under
13 section 6.2-303 of the Virginia Code. There is also a
14 Consumer Finance Act. That is 6.2-1500, and then the
15 section that the Supreme Court was interpreting in
16 *Greenberg* is 6.2-1541(A).

17 THE COURT: Do you have a claim under that act?

18 MR. GUZZO: We do not. We sued him under the
19 general usury statute, which applies to persons taking or
20 receiving payment. Both Judge Lauck, in *Gibbs*, and
21 Judge Novak, in *Hengle*, determined that that statute -- a
22 person could be held liable even though the money --

23 THE COURT: Yeah.

24 MR. GUZZO: -- came through companies.

25 THE COURT: I think the thing to do is just

1 abide the motion for summary judgment briefing and hold
2 number 9 in abeyance.

3 MR. GUZZO: I think that makes sense. Thank
4 you, Your Honor.

5 MS. KELLY: Now I know who's writing our
6 opposition to summary judgment.

7 THE COURT: Ten is exclude testimony from the
8 depositions from *Smith*, *Cumming* and *Duggan* actions. Tell
9 me about that.

10 MS. KELLY: So, Judge, we had previously briefed
11 this issue prior to the misrepresentation hearing in 2020,
12 and Your Honor ruled then that the depositions that
13 Mr. Martorello wanted to use that were taken in the *Smith*,
14 *Cummings*, and *Duggan* case would not be admissible pursuant
15 to Rule 32.

16 Mr. Martorello, in his opposition, did not
17 oppose this other than to incorporate his prior briefing
18 that your court ruled against in ECF 828.

19 We would --

20 THE COURT: You're saying that it's controlled
21 by ECF 828 --

22 MS. KELLY: Yes, Judge.

23 THE COURT: -- and that they are asserting --
24 they are not opposing it except to the extent they opposed
25 it in the briefing that led up to 828?

1 MS. KELLY: They have added nothing. But we did
2 receive Mr. Martorello's deposition designations yesterday
3 when we exchanged them -- or Monday -- in this case. And
4 I would also submit that it would be very cumulative to
5 allow those depositions because both Mr. Martorello and --

6 THE COURT: Rule 32 didn't deal with cumulative,
7 though.

8 MS. KELLY: Right, but I'm -- in addition to
9 Rule 32, it would be cumulative because Mr. Martorello
10 intends to use the deposition of James William, Jr., who
11 is the tribal chairman. That was taken in *Williams*, but
12 then he also wants to use his deposition in *Smith* and
13 *Cumming*, which we were not a part of, which, in one of
14 those, the Court has already excluded.

15 THE COURT: I thought I excluded all of them.

16 MS. KELLY: You did. But I'm just saying we
17 would be playing the same person being deposed three
18 different times in three different cases instead of the
19 deposition once when it was taken in this case.

20 THE COURT: You don't oppose *Williams* being
21 taken in this case.

22 MS. KELLY: No. No. The ones in this case.
23 And we have an agreement on cross use for all of the
24 *Galloway* cases. So we do not oppose the use of any
25 depositions in *Galloway* or the *Williams* cases pursuant to

1 our agreement. And they have known about this in 2020.
2 So if they needed any of these depositions, they could
3 have retaken them during the time discovery was open.

4 I will also say that Ms. Hazen was deposed in
5 *Williams*, and they're seeking to use her deposition in
6 *Williams* and also her deposition in *Smith*. So again, the
7 use would be cumulative there.

8 And then Ms. Weddle --

9 THE COURT: Well, it's not cumulative unless
10 it's on the same lines, it's the same questions, is it?

11 MS. KELLY: Well, that's true, Judge. But I'm
12 sure -- I mean, I haven't gone through all the
13 designations yet. We're working on our
14 counter-designations right now, but, I mean, I guess that
15 would be something we would deal with.

16 THE COURT: So why don't I just confine my
17 ruling to 828 and be done with it?

18 MS. KELLY: I think that would make perfect
19 sense.

20 THE COURT: So why shouldn't 828 prevail?

21 MR. GIVEN: Well, no. We -- Your Honor, we --
22 we just reurge it. We understand the Court ruled, but I
23 do agree with your very last statement. In fact, the
24 scope in the cross-examination previously was limited and
25 then expanded. So I don't believe it's cumulative. But

1 we're simply reurging the points made in our brief found
2 at Docket Number 804. We understand the Court ruled on
3 it. We're simply reurging it.

4 THE COURT: All right.

5 MR. GIVEN: But we don't believe it's
6 cumulative.

7 THE COURT: All right. Motion 10 is granted on
8 the basis of the ruling made in ECF 828, and the arguments
9 preserved by the defendant in connection with the
10 defendant in dispute of that ruling don't change. They
11 are here. There's no reason to -- they are here to be
12 considered in this particular motion, and there's no
13 reason to change the ruling that I can see from the papers
14 that I have.

15 All right. That brings us to number 11.

16 MS. KELLY: And I think that one is agreed,
17 Judge.

18 THE COURT: Eleven is --

19 MR. GIVEN: Your Honor, as long as it is
20 reciprocal. Because that's part of our motion in limine.
21 In other words, as long as they're not able to present
22 evidence or make arguments regarding Mr. Martorello's
23 financial condition. If it's reciprocal, that's fine.

24 MS. KELLY: Yeah, we agree.

25 THE COURT: Didn't I rule on that and say they

1 could testify why they got the loans?

2 MS. KELLY: You haven't -- I don't think you've
3 ruled on that yet. That's part of Mr. Martorello's
4 motion. But we agree not to talk about Mr. Martorello's
5 financial -- we've agreed.

6 THE COURT: They don't want you -- they are
7 willing to agree not to talk about his as long as you
8 don't talk about the plaintiffs'. Do you all need to talk
9 about the plaintiffs'?

10 MR. GIVEN: No. I think something is being
11 confused. We're limiting it to Mr. Martorello's financial
12 condition. It should not come up from either side. We
13 agree.

14 MS. KELLY: We're agreed on that. The Court has
15 ruled on 11, 12, and 13 already.

16 THE COURT: Yeah. Okay.

17 MR. GIVEN: Right.

18 THE COURT: That brings us to 14, nonmonetary
19 benefits to the tribe or that the tribe would be
20 negatively impacted by a decision of the jury.

21 Well, that's essentially the same thing as
22 motion in limine 4, in part except the damage part. Do
23 you intend to offer evidence that the tribe would be
24 negatively impacted by a jury verdict adverse to
25 Martorello? I don't know quite how that would work.

1 MR. GIVEN: Well, we thought they were. If they
2 are agreeing they're not going to get into that at all,
3 that's fine because I think that would be inconsistent
4 with their position. So that motion should be --

5 THE COURT: You kind of lost me there. Maybe
6 it's late in the day. They're making a motion they don't
7 want you to put in evidence that the tribe would be
8 negatively impacted by a decision by the jury. Are you
9 planning to offer that?

10 MR. GIVEN: It goes to the benefits
11 Mr. Martorello received, and they're going to argue that
12 Mr. Martorello received all the benefits from the lending
13 operation, and we're going to show that that's not
14 correct, that the tribe received substantial benefits from
15 the operation. That's -- so -- and we're entitled to put
16 that on.

17 THE COURT: Well, you think you are, but I'm not
18 sure you are.

19 MR. GIVEN: Fair enough. I apologize.

20 THE COURT: It's expert testimony, but I'm not
21 sure you are.

22 MS. KELLY: So, Judge, our position on that is
23 that, you know, we're not going to argue Martorello
24 received all the money. We're only going to argue that he
25 received 98 percent because that's what the documents and

1 that's what the evidence shows.

2 THE COURT: Well, it does. But then the tribe
3 received \$300 million worth of --

4 MS. KELLY: No. They have a loan saying they
5 have to pay \$300 million.

6 THE COURT: I mean \$300 million. They received
7 all these loans and they get the loans coming in when they
8 pay off the notes, and the issue is how much above
9 300 million do they get?

10 MS. KELLY: So I think the --

11 THE COURT: So what I'm saying is I don't really
12 understand what we're talking about here. Can you help
13 me?

14 MS. KELLY: Yes. So we don't believe
15 Mr. Martorello should be able to come into court and say,
16 "If it wasn't for me creating this lending enterprise, you
17 know, they wouldn't have this building where they teach
18 young kids how to read," right?

19 You know, we don't think that Mr. Martorello
20 should be able to talk about what the tribe did with the
21 money or these intangible benefits that the tribe received
22 because they received some portion of the money.

23 We agreed that Mr. Martorello could say, "Well,
24 the tribe made \$3 million." We don't disagree. But to
25 talk about where the money went and how that money

1 benefited the tribe we don't think is appropriate.

2 THE COURT: Are you planning on offering that
3 kind of evidence?

4 MR. GIVEN: Yes, because I think it's relevant
5 to -- the monetary/nonmonetary benefits the tribe got is
6 relevant to the entire enterprise and who really
7 controlled, you know, that -- that -- that kind of
8 conduct. I think that is relevant, Your Honor.

9 And I think it's going to be -- it's going to be
10 misleading and confusing to the jury if they simply get to
11 put on, well, he got this percentage and basically
12 interest is going to be -- he squeezed the tribe.

13 THE COURT: What did they get other than the
14 2 percent?

15 MR. GIVEN: Well, they got more than 2 percent.
16 They got several million dollars, plus they did get,
17 Your Honor, when they purchased -- when they purchased
18 Bellicose and SourcePoint, they got substantially more.
19 In fact, they get all the percentage at that point. From
20 2015 on, they get all the percentage, basically.

21 They have to make a note payment to
22 Mr. Martorello, but it's cash-flow dependent. In fact, as
23 we put on evidence, they didn't pay that for a year and a
24 half. They stopped paying it. We had to go to
25 arbitration. So that's all relevant, we believe.

1 MS. KELLY: So we have no problem if they want
2 to talk about the dollars that the tribe received and the
3 documents about the note, but we do not think it's
4 appropriate to talk about how the tribe spent the money
5 that they received.

6 THE COURT: Is that -- are you talking about how
7 the tribe spent the money?

8 MR. GIVEN: Well, it's really to go to the issue
9 that we want to rebut this inference they are going to lay
10 that we somehow took advantage of the tribe or squeezed
11 the tribe. That's what we're concerned with is that the
12 jury is going to be left with that inference.

13 THE COURT: How -- that doesn't make any sense
14 to me. Because if they got money and they spent it in X
15 way, how does that show that -- how does showing that
16 evidence show that you didn't take advantage of the tribe?
17 How is it probative of that topic at all?

18 MR. GIVEN: Well, I'm just concerned that the
19 way they -- you know, we can resolve for trial,
20 Your Honor, this issue in terms of approach the bench. If
21 we believe that they are now creating an inference that we
22 somehow took advantage of the tribe, which I don't think
23 is relevant to this, but they are going to try and poison
24 the well, so to speak --

25 THE COURT: Oh, there won't be any poison.

1 Will you?

2 MS. KELLY: No, Judge, we will not --

3 THE COURT: I'm going to rule that we don't need
4 to have testimony about nonmonetary benefits from the
5 tribe. But if it appears to Mr. Given that you are trying
6 to paint Mr. Martorello as satan and the tribe as a poor
7 disadvantaged entity, then I may reconsider what evidence
8 comes in.

9 But I think you all have got to remember
10 something. You get too tied up in a case sometimes. And
11 the issue here is were these loans usurious and violative
12 of the law and was there a business operation intended to
13 take advantage of that and to do it.

14 And what goes on within the confines of the
15 tribe is interesting in respect to set the table maybe,
16 but too much testimony on that topic isn't going to help
17 the jury understand the gut issue. And, in fact, what
18 it's going to do -- if you decide you want to open that
19 door, it's going to open the door for them to have some,
20 too, and I'd give some serious thought about trying to
21 pare the case down to what the real issues are and pay
22 attention to the elements because that's enough.

23 MS. KELLY: Understood, Judge.

24 THE COURT: And I think both of you will end up
25 with a fair trial if you do that.

1 But if you start making it look like it's a poor
2 'ole Indian tribe and Mr. Martorello is a -- he takes
3 advantage of everybody and he's an awful, no good --
4 dirtier-than-a-dog person, I mean, come on. That's not a
5 fair way to try the case, even if you think that.

6 So that's the ruling. I'll grant that motion,
7 14, with leave for you to reopen it, should the
8 circumstances call for it. All right?

9 MR. GIVEN: Thank you, Your Honor. Should we --
10 I don't know. Is this a good point to break, Your Honor,
11 or do you want to --

12 MR. BENNETT: We only have one more.

13 THE COURT: I think there's only one more left
14 because the others were agreed to.

15 MR. GIVEN: You are right, Your Honor. My
16 apologies. We're ready to go.

17 THE COURT: But if you're asking for a point of
18 personal privilege, I've never denied one.

19 MR. GIVEN: No. No. No. I misunderstood. I
20 thought there was more than one. We're ready to proceed.

21 THE COURT: We've got number 15, which is the
22 settlement with the tribe.

23 MR. GIVEN: Yes.

24 MS. KELLY: So the plaintiffs have requested
25 that the Court exclude argument regarding the settlement

1 with the tribe. I believe Mr. Martorello wants to be able
2 to raise it to show that the settlements shows his lack of
3 involvement and control.

4 THE COURT: The fact of the settlement.

5 MS. KELLY: Correct, Judge.

6 THE COURT: In other words, the fact that they
7 can settle their case is evidence that he didn't have
8 control. Is that what you're saying?

9 MS. KELLY: I believe that's Mr. Martorello's
10 position.

11 MR. GIVEN: Well, that's not quite correct, but
12 I'll let Ms. Kelly finish.

13 THE COURT: All right. Why don't you come tell
14 me what you --

15 MR. GIVEN: Yes, Your Honor. Our position --

16 THE COURT: Come on over here.

17 MR. GIVEN: Let me do it. Apologies,
18 Your Honor. I'll be very brief.

19 We want it for very limited purposes as follows,
20 Your Honor. One is the settlement was made with the
21 plaintiff over our objection, and we think it's relevant
22 evidence that Mr. Martorello did not direct the affairs of
23 Big Picture. Because remember Big Picture was created in
24 conjunction with the sale. Big Picture is owned,
25 operated, controlled by the tribe.

1 The second matter that's critically important is
2 our entitlement to contribution. Some people call it, you
3 know, settlement contribution. But the fact is there were
4 joint tortfeasors until they settled, over our objection,
5 and the plaintiffs have already received \$8.5 million for
6 these claims, and we're entitled to a contribution or
7 settlement credit for the amount. That's the sole purpose
8 that we seek to put this settlement agreement in.

9 THE COURT: Well, first, what evidence is there
10 that Martorello does or doesn't direct the affairs of
11 Big Picture? I didn't think it was their theory that he
12 directed the affairs of Big Picture.

13 MR. GIVEN: Oh, I think they're saying the
14 control lasts until today, and we believed it was cut off
15 any --

16 THE COURT: What difference does control make?
17 It's involvement in the affairs of the enterprise.

18 MR. GIVEN: Okay. We -- that's more well put.

19 Mr. Martorello has not been involved -- it's our
20 position he has not been involved in the affairs of the
21 enterprise we don't believe at all, but certainly that
22 cuts off in December of 2015 when the SourcePoint and
23 Bellicose were sold to the tribe and all Mr. Martorello
24 has at that point is the note back from the tribe. That's
25 it.

1 It also goes to the 1962 claim and the test
2 under 1962. So, again, we're entitled --

3 THE COURT: (d) or (c)?

4 MR. GIVEN: Pardon.

5 THE COURT: (d) or (c)?

6 MR. GIVEN: (c). 1962(c) claim.

7 THE COURT: How?

8 MR. GIVEN: It's -- it involves the test --
9 Ms. Simmons has briefed that. And I apologize. This goes
10 outside the motion in limine, but she can address that.

11 MS. SIMMONS: May I, Your Honor.

12 So it goes to the Supreme Court's decision in
13 *Reves v. Young*, which discusses the requirement under
14 1926(c) to show management or control of an entity. And
15 we submit the fact that the tribe settled over
16 Mr. Martorello's objection is probative of the fact that
17 he's not in control of what Big Picture is doing.

18 THE COURT: All right.

19 MR. GIVEN: That's -- she put it exactly.
20 That's all I have, Your Honor. Thank you.

21 MS. KELLY: And so, Judge, our -- in our reply,
22 we said that we're fine with that, but we'll want to
23 refute Mr. Martorello's --

24 THE COURT: You're fine with what?

25 MS. KELLY: If Mr. Martorello wants to have the

1 settlement disclose that it occurred for the fact that he
2 objected to it, we would agree, but we would want to
3 contradict the position taken by Mr. Martorello in
4 connection with the settlement because in the arbitration,
5 he went to arbitration and sought to intervene to
6 overthrow the settlement in this case.

7 And the reason he went to arbitration -- and
8 Mr. Given's demand letter that was sent was because --
9 some of the reasons -- there's quite a few -- is they
10 moved where they kept the documents. This is the tribe
11 moved where they kept the documents. They were not
12 providing proof of their legal bills with Rosette. They
13 were not providing bank account access so Eventide can
14 track cash left over from reserves taken from the note
15 payments. They were not providing --

16 THE COURT: You mean that's why the objection
17 was made, not because -- it was something extrinsic as to
18 why the objection was made to the settlement, and those
19 are all among the things; is that right?

20 MS. KELLY: That's correct. Mr. Martorello --
21 so Mr. Martorello got paid on the note based on how much
22 the tribe made on the lending business. So the tribe
23 would run the business and then they would get to keep a
24 small percentage and Mr. Martorello would get the rest.

25 And so when they settled with the plaintiffs and

1 lowered the interest rate and decided to make some other
2 changes to their business -- for example, Mr. Martorello
3 complains about how they capped the APR at, like,
4 699 percent because his profits and his ability to get
5 repaid -- sorry, not profits -- his ability to get repaid
6 more money on the note was negatively impacted. And so he
7 complains, for a laundry list of reasons, that, to me,
8 show a lot of participation and control still in the Big
9 Picture lending enterprise.

10 And so if they want to raise that and use that
11 as a defense, then we're going to want the opportunity to
12 oppose it using this evidence.

13 THE COURT: And you would oppose it by doing
14 what?

15 MS. KELLY: By --

16 THE COURT: Questioning him on that document or
17 what?

18 MS. KELLY: That's correct, and introducing this
19 arbitration demand and questioning him about the document.
20 That's correct. But it would be like additional
21 information that we would need to present. So --

22 THE COURT: Well, all right. I understand.

23 Do you object to that? Once you introduce the
24 settlement and say he opposed it and you're going to use
25 it to argue he didn't control. She wants to put in all

1 that stuff to show, actually, he is doing a lot of
2 directing.

3 You say it's a fact issue whether he's
4 directing, and it is, and I understand that. That's why
5 you want to use it, though. So really, there's a lot of
6 direction going on.

7 MR. GIVEN: That's fine. We just -- we should
8 be able to put it in for the reasons we stated, subject to
9 the Court's ruling. They'll put on whatever they think
10 will be impeachment or cross-examination. So if that's
11 the case, this motion in limine should be denied, we
12 submit.

13 THE COURT: My general reaction to all of this
14 is as a friend of the jury, and that is that it boils down
15 to how many angels can stand on the head of a pin, and
16 while it may be marginally relevant, it leads to confusion
17 in the minds of the jury and for the need for a lot of
18 explanation about what goes on in order to allow fair
19 cross-examination on the topic of what you want to open it
20 up for. But since both of you are willing to commit
21 seppuku, I'm going to deny the motion in limine.

22 MR. GIVEN: Thank you, Your Honor.

23 THE COURT: All right. I think that that's
24 enough for the night.

25 MR. TALIAFERRO: If I could just briefly,

1 Your Honor. If I understand the homework assignment, it
2 has now been limited to the ten documents that were listed
3 in the interrogatories.

4 THE COURT: That's correct.

5 MR. TALIAFERRO: Okay. Thank you, Your Honor.

6 MR. GIVEN: I believe it also -- I'm going to
7 provide you with the Weddle depo designations.

8 THE COURT: Yeah. No, I think he was asking
9 about a different point. Yes.

10 MR. TALIAFERRO: Thank you, Your Honor.

11 THE COURT: He was talking about his homework,
12 not yours.

13 MR. GIVEN: Okay. I stand corrected yet again.
14 The designations we submitted that Ms. Weddle testified to
15 were in *Duggan*. So there's nothing to submit now because
16 you've excluded that evidence.

17 THE COURT: Well, I have made that ruling
18 without understanding that, I think.

19 MR. GIVEN: Her deposition was taken very
20 recently in the *Duggan* case and even more recently in the
21 *Williams* case. I think that's part of the confusion.
22 Because we're already on the discovery cutoff. They have
23 already occurred in *Duggan*, which is proceeding a pace in
24 Massachusetts.

25 THE COURT: Well, I do think the reason for

1 keeping it out in *Duggan*, the participation reason -- what
2 is it 828? What was the rule? Eight something.

3 MR. GIVEN: Yeah. So --

4 THE COURT: I think that was a valid reason, but
5 I did not understand, at the time I asked you to let me
6 see the other side of what Ms. Weddle had said, that that
7 was a deposition that was in *Duggan*. I had understood it
8 was part of the same deposition that she testified to in
9 the *Williams* case.

10 MR. GIVEN: That's my lack of clarity. I
11 apologize. That's on me.

12 THE COURT: So what does that do to the need to
13 look at her designations?

14 MS. KELLY: So, Judge, I'm not familiar with the
15 *Duggan* transcript. But I'm -- I am fine if we -- if the
16 Court wanted to look at the designations provided by
17 Mr. Given for the purpose of the good faith basis defense.

18 THE COURT: I think I have to do that. I have
19 to look at them at this stage, and you might as well go
20 ahead and prepare them. I have to look at them. I don't
21 know what I'll do as a result.

22 MR. GIVEN: Will do, Your Honor. Thank you.
23 Thank you for the clarification.

24 THE COURT: Thank you. All right.

25 MS. KELLY: Thank you, Judge.

1 THE COURT: All right.

2 MR. GIVEN: We're also going to send them the
3 transcript from *Duggan*.

4 THE COURT: Okay.

5 MR. GIVEN: Make sure everybody is good. Thank
6 you, Your Honor.

7 MR. BENNETT: So did you take Ms. Weddle in any
8 other case?

9 MR. GIVEN: No, sir.

10 THE COURT: All right.

11 MR. GIVEN: Your Honor, what time are we
12 starting tomorrow morning?

13 THE COURT: 5:30.

14 MR. GIVEN: Okay. Thank you. I'll bring my
15 camping bag.

16 THE COURT: When I went to new judges school,
17 there was a judge from New York. He was a district judge
18 and he went on the Second Circuit. His name was Pierre,
19 or something like that. And he came in to give us
20 instruction in how to deal with preliminary injunctions,
21 and he said the way you deal with preliminary injunctions
22 is that you set them at 7:30 in the morning and you'd be
23 surprised how quickly they disappear.

24 One of the judges who was in the class said,
25 "You'd be surprised how quickly I'd disappear, too."

1 All right. Thank you.

2 (The proceeding adjourned at 5:10 p.m.)

3 REPORTER'S CERTIFICATE

4 I, Tracy J. Stroh, OCR, RPR, Notary Public in and for
5 the Commonwealth of Virginia at large, and whose
6 commission expires September 30, 2023, Notary Registration
7 Number 7108255, do hereby certify that the pages contained
8 herein accurately reflect the stenographic notes taken by
9 me, to the best of my ability, in the above-styled action.

10 Given under my hand this 11th day of June 2023.

11
12 /s/
Tracy J. Stroh, RPR

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LULA WILLIAMS, et al.

v.

BIG PICTURE LOANS, LLC, et al.)

Civil Action No.:
3:17 CV 461

June 8, 2023

DAY 2

COMPLETE TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Leonard Anthony Bennett, Esquire
CONSUMER LITIGATION ASSOCIATES
763 J. Clyde Morris Boulevard, Suite 1A
Newport News, VA 23601

Kristi C. Kelly, Esquire
Andrew J. Guzzo, Esquire
Casey S. Nash, Esquire
James Patrick McNichol, Esquire
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030

Counsel on behalf of the Plaintiffs

TRACY J. STROH, RPR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

1 APPEARANCES (CONTINUED):

2 Bethany D. Simmons, Esquire
3 LOEB & LOEB LLP
4 345 Park Avenue
5 New York, NY 10154

6 John David Taliaferro, Esquire
7 LOEB & LOEB LLP
8 901 New York Ave NW, Suite 300 East
9 Washington, DC 20001

10 Bernard Robert Given, II, Esquire
11 LOEB & LOEB LLP
12 10100 Santa Monica Boulevard, Suite 2200
13 Los Angeles, CA 90067

14
15 Counsel on behalf of the Defendant
16 Matt Martorello
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1 (The hearing reconvened at 10:04 a.m.)

2 THE CLERK: Case number 3:17 CV 461, *Lula*
3 *Williams, et al. v. Big Picture Loans, LLC, et al.*

4 The plaintiffs are represented by Leonard
5 Bennett, Kristi Kelly, Andrew Guzzo, Casey Nash, and
6 J. Patrick McNichol.

7 The defendant, Matt Martorello, is represented
8 by John Taliaferro, Bernard Given II, and Bethany Simmons.

9 Are counsel ready to proceed?

10 MR. GIVEN: Yes.

11 MR. GUZZO: Yes, Your Honor. Good morning.

12 THE COURT: All right. Good morning.

13 I had a partner one time who was fond of saying
14 that "night giveth counsel" and attributing that aphorism
15 to Napoleon. And I actually went back to look it up, and
16 Napoleon did say that.

17 Unfortunately, it was most prominently said the
18 night before the Battle at Waterloo started. So I'm not
19 sure what significance that it really has in our lives,
20 but night did giveth counsel to me as I was thinking
21 through some of what we did yesterday.

22 In particular, there is the question of the
23 adverse inference. That is motion in limine, what, 4?

24 MS. KELLY: Judge, it's plaintiffs' motion in
25 limine 6.

1 THE COURT: Yeah, plaintiffs' motion in
2 limine 6.

3 I don't want to mislead you in what I was saying
4 about that. When I said that Mr. Martorello would be able
5 to offer evidence about the genesis and the advice he
6 received on the contract provision that was put into the
7 purchase agreement that would effectuate a destruction of
8 all of the documents transferred by Mr. Martorello to the
9 tribe and the tribe would do that, I did not mean to
10 suggest that that would open up this general reliance on
11 counsel.

12 It would have to be -- he would be entitled, I
13 think, to put on evidence about what -- where that clause
14 came from, if it came from a lawyer, and what, if any,
15 advice he received from the counsel respecting that
16 provided that he testifies as to it and provided that the
17 lawyer testifies to it.

18 Now, in that regard, I'd like to focus your
19 attention on something, and it's not in the record. In
20 the course of practice, beginning in 1971 in the civil
21 arena and in the course of this job, which is now some
22 31 years, I have reviewed many asset purchase agreements
23 for many different purposes. I have reviewed many merger
24 agreements for many different purposes. I have never seen
25 a clause like this at all.

1 I have this recollection that there is some
2 expert testimony that might be pertaining to this where
3 somebody is going to say that's not a standard clause. Am
4 I correct about the fact that somebody's proffering
5 evidence about that?

6 I just didn't have the time to go back and read
7 all the reports on it, or that it is a standard clause. I
8 mean, it may be that I've said -- I've gotten it confused,
9 and I just didn't have time to research it.

10 Can you all help me with what you think the
11 record is about -- is there any expert testimony on this?

12 MS. KELLY: Judge, Kristi Kelly on behalf of the
13 plaintiffs.

14 What I said yesterday regarding this issue was
15 when we questioned Mr. Martorello about the clause --

16 THE COURT: Yes.

17 MS. KELLY: -- he said it was part of the form
18 agreement, which was from the *Hengle* tribal entity sale.

19 THE COURT: Right.

20 MS. KELLY: And then we were able to prepare the
21 two agreements.

22 THE COURT: Right.

23 MS. KELLY: And so that was my representation
24 was Mr. Martorello's testimony.

25 THE COURT: Yes, I know that. I'm not asking

1 that.

2 I'm asking do any of your experts purport to
3 address the -- for lack of a better word, the commonality
4 or the usualness of clauses such as this? Are you
5 offering any testimony that that's really not correct?

6 MS. KELLY: The plaintiffs are not.

7 THE COURT: No. Okay.

8 Are you offering testimony, Mr. Taliaferro, that
9 it is a standard provision in many agreements, expert
10 testimony?

11 MR. TALIAFERRO: Good morning, Your Honor.
12 Mr. Taliaferro on behalf of Mr. Martorello.

13 None of our experts are opining on that issue.

14 THE COURT: That's what I thought. I'm sorry.
15 I just didn't have the time to go back and go through all
16 of it and just confirm it myself.

17 Well, so I still have -- I still have
18 apprehension about the effect on the jury of an adverse
19 inference in the sense that issue could present a 403
20 problem in whether -- the issue is whether or not it
21 would -- A, we give an adverse inference. Let the
22 testimony in that he said that. Let the testimony in -- I
23 assume you have somebody who's going to compare the
24 agreements and say it isn't in there or you're going to
25 ask him, "Here, read this agreement and tell me where it

1 is in there." Is that one of the two, or both?

2 MS. KELLY: Judge, the latter.

3 THE COURT: All right. And so then that would
4 open up the defendant's right to say whatever it is he
5 wants to say about it, and then we would go -- he would
6 say -- I don't know what he would say because there's
7 no -- there's nothing in the record of the motion in
8 limine that portends what he would say except that he
9 understood that it was part of the *Hengle* agreement; is
10 that right?

11 MS. KELLY: That's correct, Judge.

12 MR. GIVEN: May I be briefly heard on that?

13 THE COURT: Sure. Come on up.

14 MR. GIVEN: Thank you.

15 THE COURT: Absolutely.

16 MR. GIVEN: Barney Given for the defendant.

17 I think there's a predicate issue, Your Honor,
18 that was not resolved yesterday before we get to that in
19 that the agreement was executed two years before this
20 lawsuit was filed. It was executed before any sort of
21 demand letter from --

22 THE COURT: What agreement was it?

23 MR. GIVEN: Well, the contract.

24 THE COURT: What date was it?

25 MR. GIVEN: The contract was executed in

1 December of 2015.

2 THE COURT: Yes.

3 MR. GIVEN: And then it was -- it went effective
4 in January of 2016. This lawsuit was filed in 2017. So I
5 apologize. Maybe a year and a half later from when the
6 contract was signed.

7 There was no legal demand. There's no evidence
8 been put on by plaintiffs that they had sent a demand
9 letter. They're talking about, well, he must have done
10 this because he was afraid of getting sued, but that's
11 speculation on their part, and I think for that reason, it
12 should be excluded by the rules of evidence.

13 There is no demand letter. Typically, the
14 threat of litigation is someone either files an actual
15 lawsuit or sends a demand letter. There was no demand
16 letter from these plaintiffs in existence when the
17 contract was signed, when the agreement was put together.
18 So that's my biggest issue.

19 THE COURT: There's no dispute about that, is
20 there?

21 MR. GIVEN: Pardon?

22 THE COURT: There's no dispute about that?

23 MR. GIVEN: No. No. But if that's the case
24 then how can there be spoliation if there wasn't any
25 pending litigation or threat of litigation from these

1 plaintiffs.

2 THE COURT: Have you read the Fourth Circuit's
3 spoliation cases?

4 MR. GIVEN: I have, Your Honor. I'm just
5 stating my position.

6 THE COURT: Well, I understand that. But you
7 have to come to grips with the fact that what -- the test
8 in the Fourth Circuit is that you know or reasonably
9 should know that litigation is offing in connection with
10 your decision to destroy what could be what has
11 evidentiary value.

12 So their theory is, I believe -- maybe I'm
13 wrong, but in my notes on motion in limine 6 is that he
14 did apprehend litigation and they were, A -- tell me if
15 I'm wrong about this -- the actions by the state Attorney
16 General, and I can't remember what state; B, the Otoe
17 2013-14 decisions by the District Court and the Fourth
18 Circuit; the Tucker indictment; the Hallinan indictment,
19 the CashCall trial; and the document 1166-3, which is the
20 memorandum dated August -- in August of 2012, which is the
21 Georgia Payday Lending Laws & Third-party Liability
22 prepared by Jennifer Weddle and Miranda Compton to
23 Bellicose.

24 Those are the things that I believe they say put
25 him on -- give rise to the predicate that you say is

1 missing.

2 Am I correct about what I've identified? Is
3 there anything else?

4 MS. KELLY: Judge.

5 THE COURT: If there is, you come up and say it,
6 and then Mr. Given can address it all with a full deck.

7 MS. KELLY: Yes, Judge. The one thing I would
8 also like to point the Court to, and Mr. -- this was
9 filed, I believe, at ECF 1266-1. It's been talked about a
10 lot in this case, Judge, already.

11 THE COURT: This is a document ECF 1266-1?

12 MS. KELLY: Yes.

13 THE COURT: All right.

14 MS. KELLY: And we've referred to it as the
15 e-mail where Mr. Martorello compares his business to a
16 drug cartel, illegal but highly profitable. But if you
17 turn --

18 THE COURT: What date is this, now, and where
19 does it appear?

20 MS. KELLY: So if you go to page 13 of 16 on the
21 ECF.

22 THE COURT: What is it?

23 MS. KELLY: Page 13 of 16 on ECF.

24 THE COURT: All right. Let me look at that.

25 All right. And this is from Martorello to John

1 Argyros -- who is that? -- and copy to Richard White. Who
2 are those people?

3 MS. KELLY: So Mr. Martorello was seeking a
4 valuation of the business we believe in anticipation of
5 selling it ultimately to the tribe and for tax purposes to
6 value it a certain way to make it beneficial to him.

7 THE COURT: Right.

8 MS. KELLY: So as part of that valuation, he was
9 providing information to various tax companies, and this
10 is one of the e-mails we received about that.

11 And I just want to highlight a couple of
12 provisions to show his feeling of the threat of litigation
13 pertaining to the business. And so there's a bullet point
14 on that page. He says, "What would you value medicinal
15 marijuana stores that are not yet legal and could get shut
16 down any day? What would you value a drug cartel at?"
17 And then in parentheses he says; "i.e., a business that is
18 illegal, yet very profitable."

19 THE COURT: Hold on. All right.

20 MS. KELLY: And then that next paragraph he
21 says, "This industry is going to be living in the gray
22 area of its legality for another year or two. State
23 governments will continue to sue the tribes and me saying
24 their state laws apply. Tribes will continue to say their
25 laws apply."

1 The next paragraph, "The FTC right now is suing
2 a competitor, (FTC v. AMG Services and Scott Tucker)."
3 The next sentence says, "Our client arguably employs
4 similar practices and the FTC has begun investigations of
5 several tribal" --

6 THE COURT: Where is that? "Our client." What
7 do you mean "our client"?

8 MS. KELLY: I think he's referring to himself as
9 a servicer and Red Rock, Duck Creek, the LVD as his
10 client.

11 THE COURT: So you have to ask him that. All
12 right.

13 MS. KELLY: No, I have not, Judge.

14 So, "Our client arguably employs similar
15 practices and the FTC has begun investigations of several
16 tribunal lenders like our client and their service
17 providers."

18 And then if you go to the next paragraph --

19 THE COURT: "Class action"?

20 MS. KELLY: "Class action lawsuits follow and
21 are already following Tucker's case with the FTC. Also,
22 see Martin Butch Webb/Western Sky and look that up."

23 And just so the record is clear, Judge, that's
24 the CashCall case, Western Sky, Martin Butch Webb.

25 The next paragraph, "There is no business with

1 such risk to it as this. You will simply not find any
2 business out there that can measure up on risk."

3 Then if you go to the next page, I cited -- in
4 the second half of the page, he says, "Several states make
5 it a" -- all caps -- "felony crime" --

6 THE COURT: Stop. I'm trying to find it.

7 Okay. I see it now.

8 MS. KELLY: -- "felony crime to make loans over
9 a certain rate or without a license." He then refers to
10 the 20-page memo he had --

11 THE COURT: Right.

12 MS. KELLY: -- by Greenberg Traurig, which we
13 discussed yesterday.

14 THE COURT: Right.

15 MS. KELLY: And then if you go a little further,
16 a few more bullet points down, he says, "Bottom line is
17 this business will simply not exist in two to three years
18 anything like it does right now."

19 THE COURT: All right.

20 MS. KELLY: So I think Martorello's laying out
21 there the risks that he saw and why he thought --

22 THE COURT: What does this mean, "We have
23 received dozens of letters from state AGs saying we need
24 to be licensed in sending cease and desist orders"?

25 MS. KELLY: So that means that --

1 THE COURT: Is that the AG things you were
2 talking about?

3 MS. KELLY: Yeah. When he says "we," I assume
4 he means the LVD or Red Rock or Duck Creek is being sent
5 letters from different state Attorney Generals saying --

6 THE COURT: So you can ask him that when you
7 have him on the stand.

8 MS. KELLY: Okay. Yes.

9 THE COURT: I see.

10 MS. KELLY: But I think this e-mail, which is
11 from late 2012, clearly shows that he anticipated the
12 threat of litigation. Thank you, Judge.

13 THE COURT: All right. Is there anything else?
14 That's it?

15 MS. KELLY: I think that's it, Judge.

16 THE COURT: All right. Mr. Given. Now you have
17 the full deck.

18 MR. GIVEN: No. I'll be very brief. We just
19 want the right to -- when they ask him that, to
20 cross-examine. That's all we're asking.

21 We're not going to be bringing -- we can't bring
22 Mr. Williams to trial. So we're not going to go that path
23 that, you know, he relied on counsel to put that in.

24 THE COURT: You can't bring who to trial?

25 MR. GIVEN: Mr. Williams is the lawyer that

1 drafted that. I don't think we're going to be able to get
2 him to trial, and we're not going to go that path anyway.
3 We simply --

4 THE COURT: Who is Mr. Williams?

5 MR. GIVEN: He is the attorney that drafted the
6 contract, the Eventide contract that's in question here --

7 THE COURT: Oh, I see.

8 MR. GIVEN: -- that had the provision where the
9 information would be given to the Indians and then they
10 would be the keeper, destroy the information.

11 THE COURT: All right.

12 MR. GIVEN: We're not going that path. We're
13 not going to go that path. I simply want the right to
14 cross-examine or direct examine Mr. Martorello about what
15 he believed with respect to the provision. That's all.

16 THE COURT: Well, that's -- I don't think that's
17 where we're headed. But I do believe this: He is
18 entitled -- this is his memo. If he's cross-examined on
19 it about it. He is entitled to talk about whether he
20 apprehended legal action.

21 MR. GIVEN: That's what I'm asking.

22 THE COURT: He is not entitled to testify about
23 why; i.e., a mistake of law, if we get to that point. I'm
24 not there yet. I have other evidence -- other motions.

25 But I'm saying that he is entitled to testify

1 that notwithstanding all that's said in here, he didn't
2 understand it and that there was a risk of litigation.

3 And then -- before we ever get to that point,
4 we're going to have to have briefing on whether, on that
5 issue, that is a jury issue and you need to put that
6 before the jury or does the Court need to decide that
7 before the inference is given. So we'll deal with that.
8 You might mark that down in your book as something that
9 needs to be dealt with.

10 MR. GIVEN: We'll do, and we --

11 THE COURT: But I -- right now, I'm dealing with
12 just the motion in limine and the adverse inference
13 instruction. Anything else that you have to say?

14 MR. GIVEN: No. We're just requesting that
15 there not be an adverse interest, but they'd be entitled
16 to examine him on those matters and we'd be entitled to
17 cross. That's all I'm saying. I think that's --

18 THE COURT: Well, what you all haven't done,
19 either one of you, is say mechanically how is the adverse
20 inference question addressed.

21 I've done it before, and my recollection is it
22 is a matter -- the predicate issue is a matter for the
23 Court to decide. But I may be wrong in my recollection of
24 it, and it may be something that goes to the jury.

25 Either way, if it goes to the jury, you're able

1 to cross-examine on what I said you could cross-examine
2 on. If it is a matter to be dealt with only with
3 preliminary findings by the Court, if you wish to put on a
4 preliminary -- put on Mr. Martorello as part of the
5 decision that I have to make as the predicate to letting
6 it in, I will let you do that.

7 MR. GIVEN: That's all we ask. Thank you,
8 Your Honor. We're in agreement.

9 THE COURT: Just understand that at some point
10 in time one can become a thrill seeker by asserting things
11 that one has put in writing when it's directly opposite.

12 MR. GIVEN: We understand, Your Honor.

13 THE COURT: Just advise your client of the risk
14 of that.

15 All right.

16 MR. GIVEN: And we have one more housekeeping
17 matter.

18 THE COURT: Not yet.

19 MR. GIVEN: Oh, I'm sorry.

20 THE COURT: I'm ruling that the motion in limine
21 number 6 of adverse inference instruction will be granted.
22 It is up to you to draft it. Let me see it.

23 I want briefing from you one week from today is
24 this a question the Court decides; i.e., that there's
25 reasonable apprehension of litigation, or is it a question

1 the jury does as part of its deliberation. And then I
2 would want the actual instruction that we would give the
3 jury.

4 I have done it before and I, frankly, can't
5 remember. I remember this: There was, at one time, some
6 dispute about procedurally how we proceeded, and it's been
7 so long ago that I dealt with this. And I just reflected
8 on it last night, that there is some law on that issue and
9 I just haven't looked it up. So you all get to do that.

10 File joint statements -- file simultaneous
11 statements of position next week. This is the 8th of
12 June; is that right?

13 That would be the 15th. Replies on the 17th.

14 Now, while I'm thinking about it -- we'll get to
15 your housekeeping and other things -- the pretrial
16 conference in this case is set for the 26th of June. I
17 may not be available on that date. I will know -- or at
18 that time. We definitely plan to go to the 27th anyway.
19 That's in the schedule. And then the 28th is the judicial
20 conference of the Fourth Circuit. So if we need to come
21 back, it will be the 3rd of July.

22 Do we know if Austin against Equifax, did it
23 settle?

24 THE CLERK: For which date, Judge?

25 THE COURT: You're in it?

1 MR. BENNETT: I am, Judge. It has not. There's
2 a motion that's been briefed.

3 THE COURT: What motion?

4 MR. BENNETT: This is the Experian arbitration
5 motion.

6 THE COURT: Okay. All right. Well, I have a
7 final pretrial conference on that date, and I probably
8 won't have a final pretrial conference on the 5th of July
9 if I haven't decided that by then; is that correct? Is
10 that your point?

11 MR. BENNETT: Yes, Your Honor. I'll make sure,
12 from our side, that we get with the Court to make sure
13 that the dates -- we file an appropriate motion or
14 otherwise, if that date is still sitting there.

15 THE COURT: Is the briefing in now on that
16 motion on the arbitration?

17 MR. BENNETT: No, Your Honor, the defendant, in
18 about a week, will file a reply brief, and then it will be
19 closed.

20 THE COURT: All right. I guess -- I erased
21 FPTC, and I guess maybe I was setting the argument on
22 July 5th, but it wasn't --

23 MR. BENNETT: Actually, I think that originally
24 it was set -- it's set for argument I believe maybe the
25 10th.

1 THE COURT: Yeah. So whatever I've got on my
2 book on August the 5th -- I mean on July the 5th is off.

3 So here's the question. Do you want your poison
4 on the 3rd or the 5th?

5 MR. TALIAFERRO: Your Honor, just one --

6 THE COURT: That is the continued pretrial --
7 final pretrial, if we need it.

8 MR. TALIAFERRO: Understand, Your Honor. I did
9 notify the Court back at the March status conference that
10 I will be out of the country from July -- excuse me --
11 June 30th through July 12th, which was the reason for
12 trial starting on July 13th. I will be here for the
13 pretrial if it starts on the 27th. I would just ask that
14 if it's continued to --

15 THE COURT: Well, we'll start sometime on the
16 26th. I just don't know what time. We'll continue --
17 wait.

18 MR. TALIAFERRO: If it's necessary --

19 THE COURT: Rather than interrupt your trip to
20 Europe, I'll interrupt my trip to Greensboro. Is that a
21 fair trade?

22 MR. TALIAFERRO: Your Honor, I greatly
23 appreciate that. I hate to think that I interrupted a
24 trip to Greensboro for you.

25 THE COURT: Well, if it had been to the

1 Greenbrier, I might have a different view. But Greensboro
2 is easy to decide. So that will be our schedule. I just
3 wanted to alert you of that.

4 MR. TALIAFERRO: Thank you, Your Honor.

5 THE COURT: Okay. Where are you going,
6 Mr. Taliaferro?

7 MR. TALIAFERRO: My daughter graduated from high
8 school, and I'm taking her to Paris.

9 THE COURT: I'll tell you, graduation presents,
10 I gave my great-nephew a Garmin personal locator beam, and
11 I thought I was the big thing. But going to Paris, that's
12 quite a present. How many children do you have?

13 MR. TALIAFERRO: I have four, Your Honor.

14 THE COURT: Oh, my goodness. I hope that you're
15 well financed.

16 MR. TALIAFERRO: I'm going to tell the other
17 three that this is also their graduation trip, and then
18 we'll be done.

19 THE COURT: Let me know, in the future, if you
20 succeed with that approach. I tried that similar one, and
21 it didn't work.

22 MR. TALIAFERRO: Thank you, Your Honor.

23 THE COURT: Particularly with weddings.

24 Go ahead.

25 MR. BENNETT: I can't compete with that, but

1 from -- this is the first time that the Fourth Circuit
2 conference would have Ms. Kelly or I there, and we were
3 registered and -- what I would like to be able to do.
4 We're invited and registered. If we could, off the
5 docket, work between everybody and the Court to try to
6 make sure that everybody's dates sync up for that.

7 THE COURT: You don't go to the judicial
8 conference on the 28th. That's for the judges.

9 MR. BENNETT: Well, then I go on the 29th?

10 THE COURT: Well, yeah, that's your business.

11 MR. BENNETT: Okay.

12 THE COURT: And you will be able to check in on the
13 night of the 28th if you drive fast.

14 MR. BENNETT: Okay.

15 THE COURT: I think the lawyers check in on the
16 29th. Because the judges -- we have a dinner meeting on
17 the 28th, and on the 29th is the judges' business session.
18 The lawyers all arrive on the 29th usually. You plan a
19 luxury trip to Greensboro. You're going to be down there
20 for --

21 MR. BENNETT: You know, we try to work in our
22 vacations at the same time. And I hear they have a
23 tobacco museum that --

24 THE COURT: It's a great way to work in your
25 vacation if they went to the Greenbrier, but they focused

1 on something that I think is a grievous mistake. Taking
2 away the privilege of lawyers to go to the Greenbrier and
3 have all expenses paid either by the government or by
4 their law firm actually has got to be a taking, I think.

5 So anyway, we can work it out. But I wanted you
6 to know about the slight problem I had on the 26th.

7 Okay. All right. Now, that brings me to the
8 motion in limine on the settlement. I was walking and
9 started thinking about what I had done to the jury, and
10 then I -- by letting you all commit seppuku, and then it
11 occurred to me I had overlooked a fairly critical issue.

12 The purpose of the settlement, putting the
13 settlement in, is to show that Mr. Martorello opposed it
14 and there, from that, that is evidence that he did not
15 direct the affairs of the enterprise; is that correct?

16 MR. GIVEN: That is correct. That's part of the
17 purpose.

18 THE COURT: What's the other purpose?

19 MR. GIVEN: The other purpose again, Your Honor,
20 was our claim for contribution for settlement credit. In
21 other words, as joint tortfeasors, we're entitled to a
22 credit of \$8.5 million against any judgment --

23 THE COURT: You're not going to do that in this
24 case. You're not going to have that problem at the trial
25 of this case. We will bifurcate the issue, and if they

1 return a verdict --

2 MR. GIVEN: Fair enough.

3 THE COURT: -- we'll deal with the contribution
4 later. I've found that trying to do the former creates
5 instructional problems. It puts the jury into a tailspin.

6 MR. GIVEN: Under --

7 THE COURT: You'll have the right, but we don't
8 have that as part of this issue.

9 MR. GIVEN: Understood, Your Honor, but
10 obviously -- so procedurally, the major issue is it is
11 critical that we be allowed to show, at least present
12 evidence from our part, that it is an indicia of a lack of
13 control over Big Picture loans.

14 THE COURT: I understand that.

15 MR. GIVEN: Thank you.

16 THE COURT: Now, this settlement occurred when?

17 MR. GIVEN: In -- you all -- we weren't a party
18 to it. What was the date?

19 THE COURT: It's okay to not remember every
20 date, but don't pretend like you don't know roughly when
21 it was.

22 MR. GIVEN: I just don't remember when it was,
23 Your Honor. I apologize.

24 THE COURT: What year was it?

25 MS. KELLY: It was 2019, Judge. And that's when

1 Mr. Martorello initiated the arbitration.

2 THE COURT: Now, here's the question that I
3 have.

4 Would you go in -- on the left side of my desk
5 is the complaint in this case. Would you let me have it?

6 What time period are we talking about? Because
7 we're talking about admitting evidence that occurred in
8 2019 as probative of directing the affairs of an
9 enterprise, and I don't think that the affairs of the
10 enterprise are an issue through 2019, but I need to
11 understand that.

12 MS. KELLY: I believe, Judge, the class is cut
13 off in mid-2019, which would be before Mr. Martorello
14 objected or sought to intervene in this case, if I recall
15 correctly.

16 The class period runs --

17 THE COURT: How does it get cut off? You said
18 cut off. How did it get cut off? In a class
19 certification order?

20 MS. KELLY: Correct. So the class is from, I
21 believe, June of 2013 -- sorry, Judge. I misspoke.

22 It's through December 20th, 2019. And so I
23 think the objection, the motion to intervene, was in 2020;
24 is that correct? Because it was after we had consummated
25 the settlement that Mr. Martorello sought to intervene.

1 MR. GIVEN: I think it was 2019.

2 MS. KELLY: I think the final approval was
3 December 2020, and the motion to intervene was around
4 Thanksgiving because I remember being somewhere with my
5 grandma.

6 THE COURT: Thanksgiving of what year?

7 MS. KELLY: Of 2020.

8 THE COURT: And I -- when you say the final
9 settlement, are you talking about the approval by the
10 Court?

11 MS. KELLY: Yes. Sorry, Judge. I misspoke. So
12 I believe we consummated a settlement probably in late
13 2019. I don't recall the exact date.

14 THE COURT: Well, somebody said December 20,
15 2019. Consummating means what? You signed it? The Court
16 approved it? What?

17 MS. KELLY: We agreed to a settlement, and it
18 was preliminarily approved, and final approval was in
19 December of 2020. But the class period --

20 THE COURT: You mean it took a year to finally
21 approve it?

22 MS. KELLY: Well, I think there was issues
23 because Mr. Martorello, we were trying to rope him --
24 like, bring him into the settlement. So there were
25 additional settlement conferences before we moved for

1 preliminary approval. But our class period runs from June
2 of 2013 to December 20th, 2019.

3 THE COURT: All right. Now --

4 MS. KELLY: And Mr. Martorello did not seek to
5 intervene until December 2020, I believe.

6 MR. TALIAFERRO: Your Honor --

7 THE COURT: And he intervened for what purpose?

8 MR. TALIAFERRO: I know Ms. Kelly probably has a
9 much bigger handle on this than I do, but I do have here
10 the order on the motion to intervene from the *Galloway III*
11 case.

12 THE COURT: What's that got to do with anything?

13 Oh, the settlement in this case was all wrapped
14 up in *Galloway III*.

15 MR. TALIAFERRO: Yes, sir. Yes, sir.

16 THE COURT: All right. So he -- that's the
17 first time he sought to intervene was in *Galloway III*?

18 MR. TALIAFERRO: He sought to intervene in the
19 settlement for *Galloway III* for the purposes of objecting
20 to the settlement.

21 THE COURT: When did he file that motion?

22 MR. TALIAFERRO: I don't have the date, but I
23 know it was before preliminary approval in 2019 because
24 your court's decision refers to his motion to intervene as
25 Docket Number 42 and the --

1 THE COURT: No. That's in *Galloway*. That's not
2 in this case. That's in *Galloway*. *Galloway* wasn't even
3 filed until after the settlement agreement was
4 preliminarily approved because it was that approval that
5 allowed it all to get -- got wrapped up in *Galloway III*, I
6 think.

7 Would you --

8 MR. BENNETT: What's the case number in
9 *Galloway III*?

10 MR. TALIAFERRO: 19 470.

11 MR. BENNETT: I believe it was Eventide that
12 intervened, didn't it?

13 THE COURT: Well, Martorello didn't -- did
14 Martorello that intervened or was it Eventide?

15 MR. TALIAFERRO: It was Eventide, Your Honor.

16 THE COURT: So he didn't move to intervene at
17 all?

18 MR. TALIAFERRO: That's correct.

19 THE COURT: Has he filed any objection to the
20 settlement at any point in time?

21 MR. GIVEN: No.

22 THE COURT: No? All right. Well, then that's
23 it. Unless you're willing to stipulate that he's the
24 alterego of Eventide.

25 MR. TALIAFERRO: We're not prepared --

1 THE COURT: Well, I think you have to if you
2 want to talk about it as to how it applies to him or --
3 so -- all right.

4 Well, then in my judgment, the settlement -- the
5 motion in limine 15 is denied because it will create a
6 tremendous confusion, and under Rule 403, whatever
7 probative value it may have, that at some point in time
8 Mr. Martorello moved -- Eventide moved to intervene, to
9 object to the settlement, and that that shows -- that is,
10 Eventide's objection in that point is probative of
11 Martorello's direction of the enterprise is so attenuated
12 as to not be relevant, but to the extent it is relevant,
13 it is only marginally relevant and Rule 403 would keep it
14 out because of the tremendous amount of extrinsic
15 litigation that would ensue to explain all of it. Just --
16 just as was foretold in the discussion here, it would be
17 even more so before a jury.

18 So motion in limine 15 is granted, and the
19 settlement will not be discussed.

20 All right. Where are we now? Is it your time
21 to show me the Weddle stuff?

22 MR. GIVEN: Yes, Your Honor. If I may approach.
23 I've already given a copy to the clerk and opposing
24 counsel. And these excerpts which were highlighted are
25 intended to show Your Honor the testimony regarding advice

1 of counsel, reliance on counsel, and the reasonableness of
2 the reliance. Thus, some of the background. But the
3 Court -- obviously, that's our position. I promised to
4 deliver these, and there you go.

5 THE COURT: Well, I thought you were going to
6 give me the particular citations marked.

7 MR. GIVEN: Well, they're printed out for you to
8 see. That's what they are.

9 THE COURT: Well, they're printed out, but
10 there's hundreds of pages of them.

11 MR. GIVEN: There was a lot of them, Your Honor.
12 I mean, I can read them, but those are all the citations.
13 There was quite a bit in that deposition.

14 THE COURT: And these are the depositions in
15 *Duggan*?

16 MR. GIVEN: Correct. Exactly.

17 THE COURT: All right. You gave me multiple
18 copies of the same thing? Yes, you did.

19 MR. GIVEN: There was a binder clip. There's
20 copies for your staff. Everything that is binder clipped
21 is the only copy.

22 THE COURT: Is there only one thing to read and
23 not --

24 MR. GIVEN: Correct. And I apologize. I was
25 trying to give all your staff copies.

1 THE COURT: Oh, I see.

2 MR. GIVEN: My apologies.

3 Thank you, Bethany.

4 THE COURT: Do you have one, Ms. Maloney?

5 MS. MALONEY: I do.

6 THE COURT: Are you trying to get this on the
7 best seller list of the New York Times or something?

8 MR. GIVEN: I've got to do something,
9 Your Honor.

10 THE COURT: You got stock in the copying
11 company?

12 MR. GIVEN: I wish.

13 MS. KELLY: These are really good copies. They
14 are better than the copies we give. The paper is shiny.

15 THE COURT: I need to -- have these been
16 tendered in the record?

17 MR. GIVEN: Not yet. I was going to ask the
18 Court's permission to put them in the record.

19 THE COURT: They're being considered only for
20 the purpose of comparing them to what you cited in your
21 paper. And you still have the *Duggan* issue. The *Duggan*
22 issue is that they weren't party to it and I have a ruling
23 to the deposition that this was taken in. So let me take
24 a quick look at this.

25 MR. GIVEN: Your Honor, I apologize. I gave

1 away my copy as well.

2 THE COURT: All right. You can have one back.
3 Do you want more than one? I've got plenty of them here.
4 I'll tell you what. Let's leave one for the clerk to put
5 in the record. No, you all put it in the record. After
6 this is over, take the proper steps to put it as hearing
7 exhibit such and such.

8 MR. GIVEN: That will teach me. Thank you,
9 Your Honor.

10 THE COURT: All right. I'm looking at the
11 transcript now.

12 Who is HCS Network Services? Is that anybody in
13 this case?

14 MR. GIVEN: No, Your Honor. That was a
15 processing entity that would process those bank
16 transactions.

17 THE COURT: I see. That's referred to at
18 page 47 that you gave me. I didn't understand it.

19 Who is NCAI? It's referred to on page 51.

20 MR. GIVEN: My understanding, Your Honor, is
21 that's what's -- it's not a Martorello entry. I believe
22 it's a consumer credit organization or clearinghouse of
23 some sort.

24 THE COURT: Okay. All right.

25 MR. GIVEN: But it's not a Martorello entity.

1 THE COURT: Here it is, the next question down.
2 It says the National Congress of American Indians.

3 MR. GIVEN: Okay. I was wrong. But yes, it's
4 not a Martorello entity.

5 THE COURT: All right. I've read the -- what
6 are we calling this, Martorello -- I'm going to write on
7 it -- hearing Exhibit 1 regarding -- which motion in
8 limine is this?

9 MR. GIVEN: Well, this goes to the -- it's
10 actually the advice of counsel issue. The Court had
11 directed -- we have this conversation -- in fact, there's
12 an order that we've agreed to that Mr. Guzzo is going to
13 tender where you're ordering Greenberg Traurig -- this
14 really went in part to the spoliation motion. It also,
15 though, went to motion in limine. It also goes to the
16 advice of counsel defense.

17 THE COURT: So that's motion in limine 5?

18 MR. GIVEN: Yes, Your Honor. I'm not --

19 THE COURT: I just need to make sure.

20 Just a minute. This is coming in in response to
21 the -- what document, Ms. Kelly, were you talking about
22 that cites all of the things that she testified no, no,
23 no, no advice? What document is that so I can find it
24 quickly among the thousands up here on my desk?

25 MS. KELLY: Judge, that's ECF 1270.

1 THE COURT: But what name does it have?

2 MS. KELLY: "Plaintiffs' objection to Defendant
3 Matt Martorello's Statement of Position Regarding Good
4 Faith Defense."

5 THE COURT: Okay. Give me a minute to find
6 that. Plaintiffs' objection?

7 MS. KELLY: That's correct, Judge.

8 THE COURT: And that would be ECF 1270?

9 MS. KELLY: That's correct.

10 THE COURT: And in particular, this document,
11 Martorello Hearing Exhibit Re: Motion in Limine 4 and 5,
12 Plaintiffs' Motion in Limine, appears -- is being
13 considered for the sole purpose of determining whether --
14 apart from the issue of ruling 828, I think it is, that
15 has to do with the *Duggan* depositions, it is to determine
16 whether this hearing Exhibit Number 1 is necessary in
17 order to put context to the testimony cited at pages 4, 5
18 and 6 of ECF 1270. Are we all in agreement that's what
19 we're doing?

20 MR. GIVEN: Yes, Your Honor.

21 THE COURT: All right. I will hear what you
22 have to say at this time, Mr. Given. How does it show
23 context?

24 MR. GIVEN: Simply, Your Honor, I'll be very
25 brief. As I represented to the Court -- and there was

1 testimony in *Duggan*, and I give specific examples. If we
2 go to page 35.

3 THE COURT: Of what?

4 MR. GIVEN: I'm sorry. 35 of the Exhibit 1.

5 THE COURT: Okay.

6 MR. GIVEN: Thirty-five on top, there's a
7 question, "Ms. Weddle, you testified earlier that
8 Greenberg Traurig was engaged by Bellicose in connection
9 with establishing this relationship with the LVD tribe,
10 correct?"

11 Answer, "Yes."

12 "And Greenberg Traurig gave legal advice to
13 Bellicose in connection with this engagement?"

14 "Yes."

15 Question, "And did you understand -- was it your
16 understanding that the principals of Bellicose, whomever
17 they may be, would rely on that legal advice?"

18 Answer, "That's usually why clients pay for
19 legal advice."

20 That's the first case. Just showing there was
21 clearly an engagement and intent to provide legal advice,
22 giving context to yesterday.

23 THE COURT: Okay. I agree. But I also say that
24 when one tries to be too clever by half, usually one fails
25 by whole. Because the answer to that question is either

1 yes or it's no, and it's not some general statement that
2 that's why people do things.

3 From that, you want a jury to say that she knew
4 that the principals would rely on the legal advice.

5 And, you know, it's one thing to say yes, I know
6 that, I know that and why. It's another to give a clever
7 little answer, and that answer doesn't carry you across
8 the line.

9 So that's another instance where the lawyer for
10 these people fail them by failing to be candid and
11 straightforward.

12 So that testimony proves nothing.

13 MR. GIVEN: Okay. Well --

14 THE COURT: What else?

15 MR. GIVEN: I do want to make one comment. I
16 accept the Court's ruling, but I did want to show where
17 there was testimony there was never an engagement, that
18 clearly showed at least there was an engagement. It
19 doesn't go to the reliance on the advice, but this
20 testimony is clearly about being engaged.

21 THE COURT: No, this testimony is not.

22 What is is page 35, line 12 through 17. That's
23 what is probative.

24 See, you can't use these broad statements. I
25 actually still am sentient and I'm trying to read this

1 stuff and understand it.

2 So that particular testimony does show an
3 engagement. And so --

4 MR. GIVEN: Okay.

5 THE COURT: We'll now deal with the *Duggan* part
6 of that.

7 MR. GIVEN: Well, yeah. And then, Your Honor,
8 the next one, again, it doesn't again go to reliance, but
9 on the engagement aspect, page 49.

10 THE COURT: All right. Let me get there. All
11 right.

12 MR. GIVEN: Lines 18 through 25, just for the
13 purpose of showing engagement again.

14 THE COURT: Well, let me -- that shows
15 engagement as to what? It shows engagement as to her
16 being asked to give advice --

17 MR. GIVEN: Right.

18 THE COURT: -- respecting whether they should
19 exit the litigation, join the litigation or whatever.

20 MR. GIVEN: Correct.

21 THE COURT: Yeah, that's different than -- in
22 other words, that removes it -- that's a different
23 engagement. So it's not the engagement to which the first
24 thing relates. The first --

25 MR. GIVEN: Correct. It's an ongoing

1 engagement. Again, there was --

2 THE COURT: That doesn't count, as far as I'm
3 concerned.

4 MR. GIVEN: Okay.

5 THE COURT: I think it's attenuated. It's a
6 different topic. It's not the one that's referred to in
7 the first excerpt, page 35, line 12 to 17.

8 All right. So that one we still have to decide.

9 MR. GIVEN: So we're going to have the same,
10 then, on page 51, lines 22 through 25 and on --

11 THE COURT: Hold on.

12 MR. GIVEN: Okay.

13 THE COURT: Page what?

14 MR. GIVEN: Page 51, lines 22 through 25.

15 THE COURT: Well, now, that's a different
16 question.

17 MR. GIVEN: I understand. It's just --

18 THE COURT: That's the question as to which
19 privilege was asserted.

20 MR. GIVEN: I understand. I'm just trying to
21 show engagement.

22 THE COURT: Well, I know, but wait a minute. We
23 can't take isolated facts. We have to take them -- is
24 this the question I was asking as to which she was told
25 not to answer the question because of a privilege with

1 Eventide?

2 Is it yes, Ms. Kelly? No?

3 I don't see them claiming a privilege here. It
4 says, "And when Greenberg Traurig was engaged by Eventide,
5 who is the person Greenberg Traurig was dealing with?"

6 "Just a point of clarification" -- that's of the
7 witness. "Just a point of clarification, Mr. Given. Has
8 Eventide also waived attorney-client privilege?"

9 "It has, yes. With respect to the Greenberg
10 Traurig representation, it has."

11 "Then to answer that question, my specific
12 recollection is Mr. Matt Martorello and Mr. Justin
13 Martorello."

14 Did they, at some later time, they assert a
15 privilege even though that privilege had been waived?

16 MS. KELLY: That's correct, Judge. When I took
17 Ms. Weddle's follow-up deposition a few weeks or a month
18 later, the privilege was asserted as to anything related
19 past 2015-2016 regarding Eventide.

20 THE COURT: Well, they waived the privilege.

21 MR. GIVEN: Understood. We can explain,
22 Your Honor. We're not asserting it. The order that
23 you're going to sign is going to require them to produce
24 all the documents.

25 THE COURT: Yes. Okay. All right. I

1 understand.

2 MR. GIVEN: Thank you.

3 THE COURT: Anything else?

4 MR. GIVEN: Let me just check. I think I had
5 one more thing, Your Honor, and it may just be the same
6 issue on engagement.

7 Yeah, no. It's cumulative. It's just page --

8 THE COURT: All right.

9 MR. GIVEN: It's -- it's just on page 85. The
10 question by Mr. Caddell, their co-counsel, or at least
11 joint counsel, "Who was representing Mr. Martorello and
12 his related entities at that time," meaning --

13 THE COURT: What time are we talking about?

14 MR. GIVEN: 2012, referenced by the question
15 above.

16 THE COURT: All right.

17 MR. GIVEN: Answer, "So Bellicose was a client
18 of the firm at that time."

19 And that's all I have there. Again, it just
20 goes to engagement.

21 But, again, we are joining in the Court's order
22 to require Greenberg Traurig to produce anything because
23 we have not instructed them to withhold anything, destroy
24 anything. Their file should be put before the Court.

25 THE COURT: Is there anything with Greenberg

1 Traurig pending before the Court in the way of one of
2 these miscellaneous actions or something?

3 MR. GIVEN: No, Your Honor.

4 THE COURT: There was a complaint registered --
5 I mean, there was an issue -- this issue was presented to
6 a court in Colorado? Yes or no.

7 MS. KELLY: I can answer that.

8 Judge, we subpoenaed Jennifer Weddle, and it was
9 transferred to this Court, and ultimately we withdrew that
10 subpoena because there were issues we were dealing with
11 with Greenberg Traurig to determine whether documents
12 existed. And that process essentially ceased in 2020.

13 I will say that when we received the
14 supplemental interrogatory and request for production,
15 which we provided in the binder to your court yesterday,
16 plaintiffs' counsel, seeing that there was no specific
17 advice or no documents that Mr. Martorello received from
18 them that he was relying on, you know, that was okay. If
19 that was all he had, we didn't think there was any advice
20 that he could say he relied on to have a good faith basis.
21 And so we don't think the standard was met, one.

22 Two, Mr. Given has been up here talking about
23 advice of counsel, but Mr. Martorello has stated in his
24 sworn interrogatory that he is not asserting advice of
25 counsel as a defense to this litigation.

1 THE COURT: Where is that?

2 MS. KELLY: It's in the binder that -- the
3 binder that I provided yesterday. Judge, it's also
4 attached to this pleading or objection.

5 MR. GIVEN: Counsel, what year is that
6 interrogatory you're referring to?

7 MS. KELLY: It was supplemented on I believe
8 January 30th of 2019.

9 MR. GIVEN: 2019. Okay.

10 THE COURT: All right. Which tab in your binder
11 that you gave me, and it's ECF number what?

12 MS. KELLY: It's ECF 1270.

13 THE COURT: Dash.

14 MS. KELLY: Dash 4.

15 THE COURT: All right.

16 MS. KELLY: It says, "If you intend to rely on
17 advice of counsel as a defense to any of the plaintiffs'
18 claims, identify, (1), the substance of any advice you
19 received; (2), the attorney who provided it; (3), the date
20 it was provided; and (4), any advice you received to the
21 contrary."

22 Mr. Martorello's response was, "Martorello does
23 not intend to rely upon advice of counsel as a defense in
24 this matter at this time. However, if the Court orders
25 that Martorello must waive privilege to assert his good

1 faith defense, Martorello may then elect to assert an
2 advice of counsel defense."

3 THE COURT: All right. Has a pleading been --
4 advice of counsel is a defense. Has the answer been
5 amended to include advice of counsel?

6 MR. GIVEN: It has not, Your Honor.

7 THE COURT: All right. Then it's not a defense
8 in the case.

9 MR. GIVEN: Okay. Can I just say one thing,
10 Your Honor, please. Because, again --

11 THE COURT: I'll give you a chance when she
12 finishes.

13 MR. GIVEN: Thank you.

14 MS. KELLY: And, Judge, I'd like to just make a
15 couple more comments about what Mr. Given just presented
16 in the *Duggan* deposition with Ms. Weddle.

17 THE COURT: That's hearing Exhibit 1?

18 MS. KELLY: That's correct, Judge.

19 THE COURT: It was offered -- he pointed out
20 three or four places where it was to show that there was a
21 representation and that the communication with Bellicose
22 was to Martorello.

23 MS. KELLY: And we would submit, Judge, that
24 that is not in dispute, that there was an initial
25 representation. And Ms. Weddle testified in *Williams* that

1 she represented to help with contracts.

2 THE COURT: Well, that's in what you designated
3 yourself.

4 MS. KELLY: That's correct.

5 THE COURT: So that's not in dispute.

6 MS. KELLY: Right. But we didn't see anything
7 in this Exhibit 1 where Ms. Weddle testifies about any
8 specific advice that she provided to Mr. Martorello which
9 would inform his good faith basis.

10 THE COURT: All right.

11 MS. KELLY: And so we'd like to point that out
12 to the record.

13 I would also like to direct Your Honor, in
14 Exhibit 1 --

15 THE COURT: Exhibit 1.

16 MS. KELLY: -- to page 23 of --

17 THE COURT: You mean Martorello hearing
18 Exhibit 1?

19 MS. KELLY: Correct, Judge.

20 THE COURT: Page what?

21 MS. KELLY: Page 23.

22 THE COURT: All right.

23 MS. KELLY: It is consistent with how Ms. Weddle
24 testified in the *Williams* deposition that I recently took.

25 THE COURT: Where are we talking?

1 MS. KELLY: The very top of the page. It's cut
2 off, but the question says, "And in connection with that
3 online lending operation, was that conducted on the
4 reservation?"

5 Her answer, "I don't have any knowledge of the
6 operation of the business."

7 So we would submit that she maintains that she
8 does not have full disclosure of the operations to provide
9 an opinion on the legality of the conduct.

10 I would also direct --

11 THE COURT: I don't understand how a lawyer can
12 advise a company in anything in respect of how -- of the
13 lawfulness or not of a tribal lending operation without
14 understanding what the operations are or because the
15 operation, according to the law in every circuit that I
16 know of that has decided it, has decided that it has to be
17 on the reservation.

18 And if she doesn't understand that, she can't
19 opine as to the legality or not, for she's absent a
20 critical fact in her quiver of knowledge sufficient that
21 is required to give the legal advice.

22 It is most troublesome to me what I see here. I
23 don't know that there's anything that I have jurisdiction
24 over or can say grace over, but it's distressing when you
25 see the individual pieces add up.

1 All right. Anything else?

2 MS. KELLY: Yeah, there are just two more
3 passages I would like to point Your Honor to in the
4 deposition. The next one is at the bottom of 37.

5 THE COURT: That's in Exhibit 1.

6 MS. KELLY: Exhibit 1. I'm sorry, Judge, for
7 not being specific.

8 THE COURT: What page?

9 MS. KELLY: The bottom of page 37.

10 THE COURT: Yes.

11 MS. KELLY: It's line 20, "And do you know if
12 there came a point in time where SourcePoint and Bellicose
13 got sold to the tribe?"

14 "I am aware that it occurred in 2015, yes."

15 And then it's cut off, but it says, "And was
16 Greenberg Traurig involved at all in that transaction?"

17 And then her response is "No." But that's not
18 provided here.

19 So, again, Ms. Weddle is testifying she was not
20 involved in that transaction.

21 MR. GIVEN: And we don't dispute that,
22 Your Honor. We've never alleged that.

23 THE COURT: So at the bottom of that page, it
24 ought to be, at line 25, "And was Greenberg Traurig
25 involved at" -- and then it goes to page 38, and 38 says

1 "involved at all" --

2 MS. KELLY: In that transaction?

3 THE COURT: -- "in that transaction?"

4 And her answer is no?

5 MS. KELLY: No.

6 THE COURT: And that would be on what lines?

7 MS. KELLY: That would be on lines --

8 THE COURT: That would be lines 1 through where?

9 MS. KELLY: One through 3.

10 THE COURT: All right. Page 38, lines 1, 2, 3.

11 One through 3. And that is agreed to?

12 MS. KELLY: Yes.

13 THE COURT: All right.

14 MS. KELLY: And there's one more section that's

15 not provided that I would like to read into the record,

16 and we're happy to provide the page. It is page 40,

17 line 8 through 13.

18 And the question is --

19 THE COURT: Page -- just a minute.

20 MS. KELLY: Sorry. It's 40.

21 THE COURT: It's here or not?

22 MS. KELLY: It is not here, Judge. I'm sorry.

23 THE COURT: Oh, okay. So page 40 says what?

24 MS. KELLY: It's page 40, lines 8 through 13.

25 THE COURT: Uh-huh.

1 MS. KELLY: It says, "Ms. Weddle, we'll get back
2 to the -- you know, to the 2011-2012 time period. Who, to
3 your understanding, was collecting payments on the
4 consumer loans from the consumers?"

5 Answer, "I don't have any knowledge of the
6 operations of the business."

7 THE COURT: Okay. All right. Thank you.

8 MS. KELLY: And so, Judge, I just want to --

9 THE COURT: Let's go back to the more basic
10 question here presented by tab 4, and that is this.

11 "However, if the Court orders that Martorello must waive
12 privilege to assert a good faith defense, Martorello may
13 then elect to assert an advice of counsel defense."

14 All right. Now, I think I did order that he had
15 to waive privilege in order to assert the advice of
16 counsel defense. When was that order, and what -- what
17 docket number is it?

18 MS. KELLY: So I will get --

19 THE COURT: Your team is looking for that.

20 MS. KELLY: But I did want --

21 THE COURT: Here's the point, then. Once we
22 find that --

23 MS. KELLY: Okay.

24 THE COURT: -- after the date of that order, was
25 there ever an answer to an interrogatory or an amendment,

1 was there an attempt to the answer -- the answer to begin
2 with. Was there an amendment to the answer that said he's
3 asserting as a defense advice of counsel?

4 MS. KELLY: No, Judge.

5 THE COURT: All right. So usually that's how
6 you put your defenses in is asserting something in your
7 answer. But apart from that, was there a supplementary
8 discovery response in which the defendant said, "I am
9 asserting advice of counsel," apart from the run-up of the
10 pleadings and briefings in these preliminary motions?

11 MS. KELLY: No, Judge.

12 THE COURT: So there's no normal formal
13 assertion of the right of counsel defense -- advice of
14 counsel defense in either the answer or the supplemental
15 discovery responses; is that correct?

16 MS. KELLY: That's correct. And as to the
17 advice --

18 THE COURT: Okay.

19 MS. KELLY: -- the waiver of privilege motion,
20 we will get you the date in the ECF. But Mr. Martorello
21 moved to reconsider that motion, and then the parties
22 worked together because Martorello only had possession of
23 a certain number of documents that he was withholding on a
24 log, and it's our position because most of them were
25 destroyed, which is a side issue, but we agreed to

1 withdraw our motion to waive the privilege because we had
2 to rebrief it because of things that had transpired in the
3 interim.

4 So that order was under reconsideration and then
5 the parties had to rebrief it and then we ended up not
6 filing it because we resolved it amongst ourselves with
7 Mr. Martorello.

8 THE COURT: Is there an order -- look, there's
9 an order of the Court that says he's waiving the
10 privileging. You all proceeded on your own to try to work
11 things out. That's fine. And I don't discourage that. I
12 commend counsel for that. But is there an order in the
13 record that vacates or amends the order telling him he's
14 got to waive privilege to assert the defense?

15 MS. KELLY: I don't --

16 THE COURT: Is there one or not? I mean,
17 there's how you do business in the courts, particularly in
18 a zoo of a case like this.

19 MS. KELLY: No, not that I'm aware of. I just
20 wanted to be clear --

21 THE COURT: Excuse me. Have we found the waiver
22 order?

23 MR. BENNETT: Not yet, Judge.

24 MR. GUZZO: Not yet.

25 THE COURT: All right. Do you all know it, the

1 ECF number?

2 MS. KELLY: My docket sheet is --

3 THE COURT: I think that -- you know what
4 Judge Merhige said one time? If a docket sheet gets over
5 30 pages, counsel ought to have to carry it on his or her
6 back for eternity so that the Court is relieved of that
7 obligation.

8 How are you doing?

9 THE COURT REPORTER: I'm great.

10 THE COURT: Anybody else need a recess? You're
11 all right? Okay.

12 I was going to give you a chance to chase it
13 down in a recess, if you needed a recess.

14 MR. GUZZO: That might be helpful.

15 THE COURT: All right. Let's take a recess for
16 20 minutes.

17 (Recess from 11:14 a.m. until 11:38 a.m.)

18 THE COURT: All right. What have you found?

19 MR. GIVEN: We have figured it out, I think,
20 Your Honor.

21 THE COURT: All right.

22 MR. GIVEN: So the supplemental interrogatory
23 responses, it's in Docket Number -- I'm sorry -- Docket
24 1270-4, in interrogatory 12, it states --

25 THE COURT: All right. Just a minute.

1 MR. GIVEN: Sorry.

2 THE COURT: Yes, I found that. And that was in
3 the tab in front of me.

4 MR. GIVEN: That was in the tab 4 that Ms. Kelly
5 had yesterday.

6 THE COURT: Right. So the answer is no.
7 "However, if the Court orders that Martorello must waive
8 privilege to assert his good faith defense, Martorello may
9 then elect to assert an advice of counsel defense."

10 MR. GIVEN: Right.

11 THE COURT: That's the answer.

12 MR. GIVEN: That was not supplemented. We
13 stipulate to that.

14 However -- where I think we are in agreement is
15 on interrogatory number 13, we did supplement about it,
16 intending to assert a good faith defense. And I think
17 counsel has agreed that we have properly supplemented as
18 to good faith defense but not advice of counsel.

19 THE COURT: Are you all in agreement on that?

20 MS. KELLY: Yes. And to be clear, the
21 supplementation is what is in tab 4. There's nothing
22 beyond that.

23 THE COURT: Right. The supplementation is the
24 response that is posited to interrogatory 13 as it appears
25 in 1270-4, page 5.

1 MS. KELLY: Correct.

2 MR. GIVEN: Correct.

3 THE COURT: Okay. We got it straight.

4 MR. GIVEN: So that's all.

5 And then I think -- I don't know if the Court
6 had anything else on that issue.

7 I think the next matter -- I know you still need
8 to do the documents, but Ms. Simmons is getting the
9 computer.

10 We still have our motions in limine. If maybe
11 we could take those at this point.

12 THE COURT: We'll take them, but I'm not
13 finished with what I'm doing.

14 MR. GIVEN: I'm sorry. My apologies.

15 THE COURT: Martorello Exhibit 1, then, is in.

16 Now, let me ask you this question. I have taken
17 it into account in assessing the mistake of law issue.

18 Now, on the parts of the Martorello Exhibit 1
19 that are offered to show that there was counsel -- that
20 Greenberg Traurig was retained as counsel to SourcePoint
21 and in connection therewith, they communicated with
22 Mr. Martorello.

23 As I understand your papers, you don't --
24 plaintiffs don't dispute that he was the chief executive,
25 manager, whatever you -- I guess it was an LLC, wasn't

1 it? -- of SourcePoint. So you're not contesting that he
2 got whatever SourcePoint got, are you?

3 MS. KELLY: No, Judge. In fact, yesterday we
4 provided the memo that he received as an executive saying
5 that he could be criminally liable. We're not saying
6 that.

7 THE COURT: You're relying on that.

8 MS. KELLY: That's correct, Judge.

9 THE COURT: Okay. So that's not a fact that's
10 an issue, as best I can tell, correct?

11 MS. KELLY: That's correct, Judge.

12 THE COURT: You're not going to dispute that?

13 MS. KELLY: That is -- no, we're not.

14 THE COURT: All right. Then the Martorello --
15 the testimony of Weddle that you identified as pertaining
16 to the engagement of -- I said SourcePoint. It's
17 Bellicose, isn't it?

18 MS. KELLY: It was Bellicose.

19 THE COURT: And then there's some question about
20 SourcePoint, too. So it's both of them. None of that is
21 an issue.

22 Therefore, the testimony offered to show that
23 Greenberg Traurig was representing those -- whatever
24 entities they were is not relevant at all, and so that
25 testimony need not come in -- cannot come in. And

1 therefore, in addition the *Duggan* ruling -- *Duggan* issue,
2 which is that the plaintiffs in this case weren't
3 represented at those depositions and the ruling therein
4 reflected in 828, precludes the testimony.

5 However, if you begin to make an issue out of
6 whether there was or wasn't representation and whether or
7 not Martorello got information that was sent to Bellicose
8 or SourcePoint, then I'll revisit that at that time. But
9 I don't see that it's going to be an issue, given the
10 evidence that you have proffered that you're going to
11 offer.

12 As to the other testimony that is not what I
13 call the retention testimony or the representation
14 testimony that you referred to, Mr. Given, at the various
15 pages you just did, page 35, lines 12 through 25, and the
16 rest of that testimony in Martorello hearing Exhibit 1
17 does not rebut or give context to the deposition testimony
18 cited in 1270, ECF 1270, pages 4, 5 and 6, respecting
19 whether she gave advice to Martorello. So it's not
20 admissible for that purpose.

21 The record will -- the document will be placed
22 in the record --

23 MS. KELLY: Okay.

24 THE COURT: -- as Martorello hearing Exhibit
25 Number 1 to motion in limine 4 and 5.

1 All right. Now, we have -- I see that
2 Ms. Simmons is back. Is there something else we need to
3 do on that?

4 MR. TALIAFERRO: Your Honor, I believe at this
5 time we are to our homework assignment from last night,
6 which is to present the Court with our position on the ten
7 documents which were identified in the interrogatory
8 response.

9 THE COURT: All right. And the ten documents
10 are where? What notebook will I find those in? I had
11 them yesterday, but I'm just not sure what we're talking
12 about.

13 MR. TALIAFERRO: They would be in the good faith
14 defense binder, but we will limit our discussion to the
15 ten that we -- the parties have agreed were identified in
16 the --

17 THE COURT: Here it is.

18 MS. KELLY: Judge, we made binders of just the
19 ten documents for everyone, if that helps.

20 THE COURT: Will that help?

21 MR. TALIAFERRO: Yeah, we would accept that.

22 THE COURT: All right. And they are the ten
23 documents associated with what document? ECF -- what is
24 the document -- what's that -- Ms. Maloney, what's that
25 document? Law.

1 MS. MALONEY: 1261.

2 MS. KELLY: ECF 1261.

3 THE COURT: Yeah, ECF 1261.

4 MR. TALIAFERRO: 1261.

5 THE COURT: Can I have that, please?

6 MS. KELLY: That is the single-sided, and then
7 we have one for Morgan.

8 THE COURT: May I have that, 1261, or maybe I've
9 already got it. Let's see. Hold on.

10 MS. MALONEY: You should have it.

11 THE COURT: I don't see it.

12 MS. KELLY: I think the unredacted version,
13 Judge, is not 1261.

14 THE COURT: No. What is it.

15 MS. KELLY: 1270 --

16 THE COURT: 1277, right?

17 MS. KELLY: 1275.

18 MR. GIVEN: Yeah. That's correct.

19 THE COURT: Yes, it's 1275 is the sealed filing
20 of 1262. Not 1261. 1262.

21 MR. TALIAFERRO: Ms. Simmons will handle this
22 portion, Your Honor.

23 THE COURT: And then the documents that we're
24 talking about now are those ten of the ones that are
25 allowed that are cited in the chart that appears in 1275,

1 pages 9 through 17.

2 So just so my recordkeeping will be straight, of
3 the documents, now, where -- which ones are the ten? Use
4 the exhibit number on the right-hand column there so I'll
5 just check off which ones I'm talking about.

6 MS. SIMMONS: Exhibit BB.

7 THE COURT: Wait just a minute. BB.

8 MS. SIMMONS: Exhibit FF.

9 THE COURT: All right.

10 MS. SIMMONS: Exhibit KK.

11 THE COURT: All right.

12 MS. SIMMONS: Exhibit LL.

13 THE COURT: All right.

14 MS. SIMMONS: Exhibit MM.

15 THE COURT: All right.

16 MS. SIMMONS: Exhibit CCC.

17 THE COURT: All right.

18 MS. SIMMONS: Exhibit DDD.

19 THE COURT: Just a minute.

20 MS. SIMMONS: I'm not sure if the -- excuse me.

21 THE COURT: I don't have an Exhibit DDD.

22 MS. SIMMONS: Yeah. I'm looking, Your Honor.

23 I'm not sure --

24 MS. KELLY: Bethany, we had EE in our binder.

25 MS. SIMMONS: Okay. So maybe we're not --

1 THE COURT: EE or EEE?

2 MR. TALIAFERRO: Your Honor, I think, as
3 Ms. Simmons is going to tell you, DDD, which we submitted
4 is the memo that was attached to CCC, which is the cover
5 e-mail. And that may not be in Ms. Kelly's binder, but --

6 THE COURT: Well, there's -- there is no -- on
7 your paper 1275, there is no DDD, as I see it. There is a
8 CCC and unless the page numbers are wrong, which they do
9 not appear to be either by your pagination or the
10 ECF pagination, there is no DDD. It goes from CCC to EEE.

11 MS. SIMMONS: So here is -- so this is what I'm
12 referring to as CCC.

13 THE COURT: CCC says that it's an April 2015
14 source document from Rosette, LLP, and it says, "Rosette,
15 LLP issues a memorandum regarding its 2015 federal and
16 state lending strategy with the goal of maintaining a
17 strong advocacy presence to protect and preserve the
18 longevity of tribal online lending businesses."

19 And the documents -- now, I will say -- oh, I
20 see. I beg your pardon. It says Exhibit CCC, and then
21 down at the bottom, it says, "And Exhibit DDD."

22 MS. SIMMONS: Yes, Your Honor.

23 THE COURT: Okay. So it's both of these.

24 MS. SIMMONS: We submit that it is, although --

25 THE COURT: Okay. I see it. Now, is that it?

1 Is that the ten?

2 MS. SIMMONS: It's not, Your Honor. And I
3 actually -- I'm looking at the binder that Ms. Kelly put
4 together, and it looks like there's some differences from
5 our understanding. And so --

6 THE COURT: Well, let's do this. Why don't you
7 do this. Let's get the documents you say were provided
8 identified -- and all ten of them. Is EEE one of the ten?

9 MS. SIMMONS: So, Your Honor, on that point,
10 I -- we've provided to the Court earlier this morning the
11 list of the documents that we think was identified. It's
12 a separate chart so you have it in one place. Or I'm
13 sorry. We provided it to Ms. Maloney. I have a copy for
14 the Court, if I may, Your Honor.

15 THE COURT: That would be fine. But what I'm
16 doing is making notes on what I've already done so I'll
17 use that. But I want to know, is EEE part of the ten?

18 MS. SIMMONS: I do not have EEE as part of the
19 ten.

20 THE COURT: Okay. After DDD, what is -- is
21 there any more of the ten?

22 MS. SIMMONS: I have GGG.

23 THE COURT: All right.

24 MS. SIMMONS: I have HHH. I have JJJ, and I
25 have MMM on my list.

1 THE COURT: Do you agree that those documents
2 were the ten, Ms. Kelly?

3 Why don't you two go back there and talk for a
4 minute and let's get this -- this is a mechanical issue.
5 It just needs to be sorted out, and we'll be off the
6 record.

7 All right. It being five minutes to 12, if I
8 had realized there was a problem, I would have just said
9 fix it over lunch. Can you fix it over lunch?

10 MS. KELLY: Yes, Judge.

11 MS. SIMMONS: Yes, Your Honor.

12 THE COURT: All right. We'll take the lunch
13 hour at this time and be back at 1:00.

14 MR. GIVEN: Thank you, Your Honor.

15 (Recess from 11:53 a.m. until 1:18 p.m.)

16 THE COURT: All right. So are we in agreement
17 that the ten documents that she identified are the ten
18 documents at issue? And you've put the ten documents in a
19 binder, right?

20 MR. TALIAFERRO: I think we are up to 11 by
21 agreement of the parties, but we have a binder for the
22 Court.

23 THE COURT: What's the 11th one?

24 MR. TALIAFERRO: It's Exhibit HHH was added.

25 THE COURT: Okay. I have ten in my little chart

1 here.

2 MS. SIMMONS: I have an updated chart for
3 Your Honor. May I hand it up?

4 THE COURT: All right. Everybody's in agreement
5 that this is what I should be using?

6 MS. KELLY: The plaintiffs are.

7 MS. SIMMONS: All right.

8 THE COURT: Okay.

9 MR. GUZZO: He has an updated binder.

10 THE COURT: All right. So let's start. Now,
11 what is our task here that we're doing here?

12 Let me see what this chart pertains to in the
13 1275. This chart is offered in support of the view that
14 Martorello's good faith belief is informed by counsel
15 representing his companies, counsel representing the
16 tribe, and public sources of information. And these
17 exhibits are the ones that we say support that; is that
18 correct?

19 MS. SIMMONS: These are the ones that the
20 parties agree were set forth in Martorello's discovery
21 response. So these are the 11 that the parties agree are
22 at issue.

23 THE COURT: All right. The first one is BB; is
24 that right? So where does it say that -- show that it
25 does what it's purporting to do?

1 MS. SIMMONS: So, Your Honor, this is an e-mail
2 from Jennifer Weddle to Matt Martorello, Karrie Wichtman,
3 and copying Justin Martorello. It's discussing --

4 THE COURT: Where on the document does it do
5 anything? Just get me to that language first, and then I
6 can go from there.

7 MS. SIMMONS: So, Your Honor it attaches a
8 letter, a draft letter.

9 THE COURT: This is a draft. The Greenberg
10 Traurig is a draft, right?

11 MS. SIMMONS: Correct.

12 THE COURT: All right.

13 MS. SIMMONS: And in the cover e-mail,
14 Ms. Weddle suggests providing a substantially similar
15 letter to LVD's ACH provider. And the letter itself goes
16 through --

17 THE COURT: Wait a minute. This is from Weddle
18 to Martorello dated August 19, 2013. So where does it --
19 where does it -- where in the memo, and then the letter,
20 what specific language is said to inform his good faith
21 belief? Just point me to that language.

22 MS. SIMMONS: So, Your Honor, we think that
23 there's a number of points in the letter. But to begin
24 with --

25 THE COURT: I'm only going to consider the ones

1 you identify for me. That's what I have to do.

2 MS. SIMMONS: So, Your Honor --

3 THE COURT: Is there in the memo, the cover
4 e-mail itself, any text? And I don't want to go through
5 what we went through yesterday. When I ask where is the
6 text, I want to know exactly where the text is so I can
7 highlight and then I can read it.

8 MS. SIMMONS: So the letter itself says --

9 THE COURT: Excuse me. I asked the question
10 about the e-mail. Is there anything in the e-mail?

11 MS. SIMMONS: I apologize Your Honor. I meant
12 to say e-mail. I misspoke.

13 THE COURT: Where is it?

14 MS. SIMMONS: The e-mail itself -- there's --
15 it's a suggestion that he --

16 THE COURT: Is there any language in there that
17 I need to --

18 MS. SIMMONS: No. There's nothing you need to
19 highlight about the e-mail itself.

20 THE COURT: All right. Now I'll look at the
21 draft letter. Where in the draft letter do I find
22 something that informs his good faith belief as
23 articulated in the beginning of 1275? So where is it?

24 MS. SIMMONS: So if you look to the executive
25 summary portion, Your Honor, on the second page of the

1 letter --

2 THE COURT: Yes.

3 MS. SIMMONS: -- Bates stamp 2803, it says, and
4 the underlined language is applicable -- "To the contrary,
5 and let me be clear, any ACH debits to a New York consumer
6 account originated for any Ft. Belknap enterprise,
7 including Blue Sky, is entirely legal."

8 And recall back that the e-mail itself is saying
9 this applies to the LVD analysis as well.

10 THE COURT: Well, it doesn't say that. Where
11 does it say that?

12 MS. SIMMONS: The cover e-mail says that.

13 THE COURT: Where does it say this applies to
14 the LVD analysis?

15 MS. SIMMONS: Sorry. "LVD agrees with this
16 analysis."

17 THE COURT: Well, that's not the same thing as
18 that it applies to the analysis. It's that LVD agrees
19 with it. That doesn't say that the LVD situation matches
20 what is being commented upon in the executive summary. It
21 says the LVD agrees with this analysis. That just says
22 the tribe agrees with it. Okay.

23 MS. SIMMONS: Okay.

24 THE COURT: I understand what you're saying.

25 Okay. Anything else in here that we got, any

1 other text?

2 MS. SIMMONS: The second paragraph of the
3 executive summary, Your Honor --

4 THE COURT: Yes.

5 MS. SIMMONS: -- also points to --

6 THE COURT: It says, "Second?" Is that what you
7 want me to --

8 MS. SIMMONS: Yes. That paragraph as well,
9 Your Honor.

10 THE COURT: The whole paragraph?

11 MS. SIMMONS: Yeah. Because it says, you know,
12 the -- we want to provide you with the context for the
13 lending enterprises, including the background about the
14 legal posture of the enterprises, which are established
15 and operated --

16 THE COURT: Slow down, please.

17 MS. SIMMONS: -- pursuant to the tribe
18 sovereignty -- the inherent sovereignty, the robust
19 consumer protection measures the tribe employs --

20 THE COURT: Okay. I see it.

21 MS. SIMMONS: -- and the tremendous good its
22 lending enterprises have brought.

23 THE COURT: All right.

24 All right. Anything else in this document?

25 MS. SIMMONS: Your Honor, there's a --

1 THE COURT: And remember the question is
2 anything else that is said to inform Martorello's good
3 faith belief as set forth in this document? And that
4 would be in the first part of the document. His belief is
5 that the loans were governed by the laws of the LVD Band
6 of Lake Superior Chippewa Indians and applicable federal
7 law and were lawful. Right?

8 MS. SIMMONS: Correct, Your Honor. So if you
9 move to --

10 THE COURT: So is there anything else in this
11 document that is said to inform that belief?

12 And if I use the word "that belief" anymore, I'm
13 referring to the beliefs set out in paragraph A, page 1,
14 ECF 1275. So is there anything else that I should look at
15 and highlight when I'm thinking about it?

16 MS. SIMMONS: Your Honor, that's the executive
17 summary.

18 THE COURT: That's it. Okay.

19 MS. SIMMONS: The reminder of the letter
20 expounds upon why those conclusions are being reached in
21 the executive summary.

22 THE COURT: Well, I didn't ask you that. I
23 asked what text -- you're talking about that informs the
24 belief.

25 MS. SIMMONS: So I --

1 THE COURT: I'm not going to sit here and read
2 and guess what he discerned from -- and found important.
3 I can't do that. That's a speculative endeavor that I
4 shouldn't do. I need you to tell me what it is that he
5 says informed his belief.

6 MS. SIMMONS: The conclusions of the letter,
7 Your Honor, which say --

8 THE COURT: All right. The conclusions in the
9 executive summary; is that right?

10 MS. SIMMONS: Yes.

11 THE COURT: Okay. Next document. KK, right?

12 MS. SIMMONS: Yes, Your Honor -- or the next
13 document I believe is EE.

14 THE COURT: EE, yes. Okay. All right. And
15 that is a memo from -- who is this? Gkway, who is that?

16 MS. SIMMONS: It's a -- it is the -- that's the
17 CEO of Duck Creek, who also goes by Michelle Hazen and
18 Ms. Michelle Allen. I'm not going to purport to know how
19 to pronounce this name.

20 THE COURT: Well, that's the tribal name.

21 MS. SIMMONS: Yes, that's the tribal name. But
22 she goes by Michelle Hazen.

23 THE COURT: Michelle Allen.

24 MS. SIMMONS: Michelle Hazen --

25 THE COURT: Hazen.

1 MS. SIMMONS: -- is I think the more recent.

2 THE COURT: Okay. And then we have a copy -- or
3 it's addressed to Martorello inter alia, a bunch of other
4 people. Matt Martorello. Okay. All right. Now, where
5 in here?

6 MS. SIMMONS: If you go to the second page,
7 Your Honor, which has the Bates stamp 2700.

8 THE COURT: All right. Where?

9 MS. SIMMONS: Ms. Wichtman says, "I disagree
10 with your statement of Judge Sullivan's 9/30 order" --

11 THE COURT: Wait just a minute. "While I
12 disagree," okay, "with your statement Judge Sullivan's" --
13 that actually ought to have a comma there, I suppose; is
14 that right?

15 MS. SIMMONS: I would have put one in if I would
16 have drafted it, Your Honor.

17 THE COURT: -- "Judge Sullivan's 9/30 order
18 right now today represents a basis for New York
19 authorities to initiate enforcement proceedings."

20 Is there anything else?

21 MS. SIMMONS: Your Honor, if you move to --

22 THE COURT: Is there anything else in that
23 sentence?

24 MS. SIMMONS: No, Your Honor.

25 THE COURT: And then anything else in that

1 paragraph?

2 MS. SIMMONS: No.

3 THE COURT: All right. Where?

4 MS. SIMMONS: If you move to page 2702.

5 THE COURT: All right. Paragraph carryover or
6 paragraph beginning, "Indeed."

7 MS. SIMMONS: The carryover paragraph,
8 Your Honor.

9 THE COURT: Where? Which line?

10 MS. SIMMONS: The sentence beginning, "It
11 matters not."

12 THE COURT: -- "how Judge Sullivan's order will
13 be regarded by overzealous regulatory agencies but rather
14 that such an order is not, in fact, a final order of the
15 Court on the merits changing a material aspect of the
16 legal requirements governing the agreement of the
17 parties."

18 Okay. Is there anything else?

19 That's the effect of Judge Sullivan's order
20 language. Okay. Is that the Otoe order?

21 MS. SIMMONS: That's the District Court one,
22 yes.

23 THE COURT: Uh-huh. All right. Anything else?

24 MS. SIMMONS: I believe that's all from that
25 e-mail, Your Honor.

1 THE COURT: All right. FF are we on?

2 MS. SIMMONS: Yes.

3 THE COURT: That's a Rosette dated October 13th
4 to Craig Colton at LST Financial. What's this got to do
5 with anything?

6 MS. SIMMONS: So for this one, Your Honor --

7 THE COURT: It doesn't show that it goes to
8 Mr. Martorello on the address or the carbon copy
9 recipient. So --

10 MS. SIMMONS: Your Honor, on that one, it's
11 produced by MidMarch, which was an entity that was doing
12 diligence for consulting for Mr. Martorello.

13 THE COURT: How does it connect to Martorello?

14 MS. SIMMONS: The point is that he received a
15 copy of it.

16 THE COURT: How do we know that? It's not on
17 here.

18 MS. SIMMONS: For this one, my understanding is
19 that plaintiffs are stipulating that he received it. If
20 that's not correct, let me know.

21 MS. KELLY: Not on this one.

22 MS. SIMMONS: Not this one? Okay.

23 So our position is --

24 THE COURT: What proof is there that he received
25 it?

1 MS. KELLY: I mean --

2 THE COURT: It can't inform his belief if he
3 didn't receive it and read it. So what evidence is there
4 that he received it, Ms. Simmons?

5 MS. SIMMONS: The evidence, Your Honor, is the
6 fact that MidMarch had it. They couldn't have had it if
7 Mr. Martorello didn't have it in the first instance.

8 THE COURT: And if a frog had wings, he wouldn't
9 hurt himself when he hopped.

10 Look, what's the evidence that he received it?
11 The fact that MidMarch received it doesn't prove that he
12 received it. What evidence is there? If there isn't any
13 evidence that he received it, I don't know how I can
14 consider it as informing his belief.

15 MS. SIMMONS: Your Honor, that's all that I was
16 able to discern from the documents.

17 THE COURT: All right. I will not consider it.
18 There's no evidence that Martorello received it.

19 All right. It can't be considered in my
20 assessment.

21 KK is next. January 10, 2014, letter from
22 Rosette, and it doesn't say who the addressees are.

23 MS. SIMMONS: It does not, Your Honor. For
24 this --

25 THE COURT: Do we know who the addressees are?

1 MS. SIMMONS: I believe -- so this document is
2 discussed in the deposition of Karrie Wichtman, and she
3 discusses in there who received it.

4 THE COURT: Well, how does she know who received
5 it?

6 MS. SIMMONS: Because she's -- I mean, you can
7 look at the deposition transcript. I had submitted it
8 with --

9 THE COURT: What does the deposition transcript
10 say? You can tell me.

11 MS. SIMMONS: I had given the Court an excerpt
12 of it this morning at Exhibit 1. Do you need another
13 copy?

14 THE COURT: Well, I just want you to tell me
15 what part of it says that. I've got the copy. What part
16 of the thing says that Martorello received it? What part
17 of the deposition?

18 MS. SIMMONS: So on page 157, she says that
19 Payment Data Systems received it.

20 THE COURT: Hold on. Hold on. Page 157. We're
21 talking about Martorello hearing Exhibit 1; is that right?

22 MS. SIMMONS: No, Your Honor. That's the
23 Weddle. I'm talking about the Wichtman -- the Wichtman
24 deposition excerpt that I handed to the Court earlier.

25 THE COURT: I don't have that. I have a -- I

1 have a Weddle deposition. I don't have any Wichtman
2 deposition. Do I?

3 Do you have it?

4 MS. MALONEY: I'm looking.

5 THE COURT: At the beginning of the hearing, I
6 don't think I got any.

7 MS. SIMMONS: Okay.

8 THE COURT: All right. This is marked Exhibit 1
9 of some kind. What's it Exhibit 1 to?

10 MS. SIMMONS: It's Exhibit 1 to this statement.

11 THE COURT: Which statement?

12 MS. SIMMONS: The chart, Your Honor.

13 THE COURT: I don't have any such thing that
14 you're talking about. Let me look.

15 This was handed up? And I have exhibit -- no.
16 That's just the -- that's the list. That's the new list.
17 And there wasn't an exhibit handed up with it.

18 MS. SIMMONS: It should be binder clipped to it.

19 THE COURT: But it isn't.

20 MS. SIMMONS: Okay. Well, I have another --

21 THE COURT: So what you want me to -- take that
22 down.

23 Is this what it is that she -- that you're
24 talking about that you handed up entitled "Defendant Matt
25 Martorello's Supplemental Statement of Position Regarding

1 Good Faith Defense Pursuant to Order at Docket
2 Number 1247?

3 MS. SIMMONS: It is, Your Honor. We updated it
4 further.

5 I can't see the version that you have. I
6 apologize.

7 THE COURT: Well, I have the version that I have
8 has -- would you hand that to her, please?

9 I want to make sure I've got the right thing.
10 Ms. Maloney has a copy of that that has Exhibit 1 and 2,
11 but I don't have that. I have what you handed up as
12 Exhibit 1, which is a deposition, but I don't have the
13 version of that document. Does it have an ECF number at
14 the top?

15 MS. SIMMONS: No, we didn't file it yet,
16 Your Honor. We had intended to, and we'll do so after the
17 hearing, but we -- it hasn't been filed yet.

18 THE COURT: All right. Exhibit 1 is a two- or
19 three-page excerpt from a deposition of Karrie Wichtman.

20 MS. SIMMONS: Yes.

21 THE COURT: And what's Exhibit 2?

22 MS. SIMMONS: Exhibit 2 is -- was an e-mail,
23 Your Honor, but it deals with a later document.

24 THE COURT: Well, send me that back up. You've
25 got that, do you? Do you all have that? Make sure you

1 got the -- we're talking about the same document.

2 Years ago, I was in a multi-district case of
3 great import. In the middle of my examination of a
4 witness before Judge Merhige, he described that these
5 documents had been Payne-ized.

6 Twenty years later, I was reading another case
7 and I found out that Payne-ized had been coined as a word
8 of art for confused document. The remedy to Payne-izing
9 is a completely knowledgable legal assistant who handles
10 the documents. You need to get one.

11 All right. Now -- do you have, Ms. Kelly, the
12 version -- the extant version of the supplemental
13 statement of position regarding good faith defense and its
14 Exhibit 1?

15 MS. KELLY: I do, Judge. I do.

16 THE COURT: All right.

17 Now, the question on the table is what evidence
18 is there the letter at EE in the chart was ever seen by
19 Martorello. And you tendered this deposition. At what
20 page do I read?

21 MS. SIMMONS: So at 157, she talks about this
22 specific letter.

23 THE COURT: Wait just a minute. All right.

24 Okay. It's a letter dated January 10th of 2014.
25 So that's what we're talking about; is that right?

1 MS. SIMMONS: Yes.

2 THE COURT: And it's redacted in terms of who
3 it's addressed to. But if you look at the first
4 paragraph, second sentence, "We appreciate your services
5 and thank you for providing payment processing services to
6 the tribe Duck Creek Financial, LLC, doing business as
7 Pepper Cash." So this was sent to Duck Creek or who?
8 That doesn't tell me anything.

9 MS. SIMMONS: It was sent on behalf of
10 Duck Creek to the payment processor.

11 THE COURT: And who is that?

12 MS. SIMMONS: It's -- it's Payment Data Systems.

13 THE COURT: Okay. So the addressee is Payment
14 Data Systems. All right.

15 Now, what evidence is there that Mr. Martorello
16 received this or read it?

17 MS. SIMMONS: So the question at the deposition
18 was -- if you look at page 159 of Exhibit 1.

19 THE COURT: All right.

20 MS. SIMMONS: And the question at line 10 was,
21 "Did you discuss these concepts with Mr. Martorello?"

22 And her response was, after trying to still
23 figure out who the letter was addressed to, was, "Over
24 time."

25 THE COURT: But first, she says, "I don't know

1 who this was addressed -- I mean who was this cc'd to.

2 Yes, over time."

3 You mean that answer means that she discussed it
4 with Martorello over time?

5 MS. SIMMONS: That's what she appears to be
6 saying in the deposition, that she discussed the concept
7 in this letter over a period of time.

8 THE COURT: All right. So what concepts did she
9 discuss?

10 MS. SIMMONS: So if you look at the letter
11 itself --

12 THE COURT: No. What evidence is there in her
13 testimony about the concepts that she discussed with him?
14 There are a lot of concepts here in this document. So
15 which ones -- is there any evidence of what she actually
16 discussed with him?

17 MS. SIMMONS: So if you look further up on
18 page 158 -- excuse me. If you turn back to -- turn back
19 to page 158.

20 THE COURT: All right.

21 MS. SIMMONS: And she's saying, on page 2 of the
22 letter --

23 THE COURT: It's the third paragraph on page 2
24 of Exhibit EE. Is that what we're on?

25 MS. SIMMONS: KK, Your Honor.

1 THE COURT: KK. "Okay. Turn to page 2 in this
2 paragraph, again, right above the background on LVD
3 Lending Enterprises, the 2(b) paragraph." Okay. So what?

4 MS. SIMMONS: And then she says that it's
5 accurate at the time, and she believes it was accurate
6 today.

7 And then if you go to page 8 of the letter, the
8 Conclusion paragraph.

9 THE COURT: Page 8 of the letter, Conclusion,
10 uh-huh.

11 So what? I mean, you're asking her if she
12 thinks it's accurate.

13 The question is did she discuss these concepts
14 with Martorello?

15 And she's very indefinite about it. Then she
16 says, "Yes, over time."

17 But my question is is there anything in this
18 deposition transcript, Exhibit 1 to the supplemental
19 statement of position about good faith, that shows what
20 concepts she discussed with Martorello?

21 MS. SIMMONS: So the concepts that were
22 discussed at the deposition were the ones that I just
23 highlighted to the --

24 THE COURT: That isn't what I asked you. I said
25 is there anything that says which concept was discussed

1 with Martorello? There's a lot in here. It's 8 pages of
2 concept.

3 MS. SIMMONS: And the deposition --

4 THE COURT: And depending upon what was
5 discussed with him, it may or may not be pertinent to
6 informing the view of things.

7 MS. SIMMONS: So during the deposition, she said
8 the concepts that were being discussed were the ones that
9 I highlighted to the Court on page 2 and page 8 of the
10 letter, and she said these concepts.

11 THE COURT: She does not say that in this
12 excerpt that I have. Is it somewhere else in another
13 excerpt?

14 MS. SIMMONS: On page 159 at line 10, lines 10
15 to 13 are what we were referencing.

16 THE COURT: Yeah, these concepts. We don't have
17 a definition of what these concepts were.

18 MS. SIMMONS: And, again, I'd submit --

19 THE COURT: She said that a fair inference is
20 that the concepts means the conclusion? Is that what
21 you're trying to tell me?

22 MS. SIMMONS: Yes, that's the fair --

23 THE COURT: What's your man going to say?
24 You've got a witness. You know what he says. What's he
25 going to say? That he discussed the conclusion with her.

1 Does he say that?

2 MS. SIMMONS: Well, depending on what the Court
3 allows him to say, he's going to say that he discussed
4 concepts like this that are contained in all of these
5 various documents.

6 THE COURT: That is not the question. That is
7 not the question. And I don't care. He's not going to
8 come in here and testify that he did concepts like this.
9 He's going to say that he discussed with her the concepts
10 reflected in the Conclusion section. Then we know what
11 he's talking about.

12 Listen, this guy will say anything, and I -- he
13 needs to be specific about what he's saying so we can
14 understand what he's saying.

15 MS. SIMMONS: And we understand the Court on
16 that.

17 THE COURT: Is he going to say that? Because if
18 you add her testimony and his, if he says that, then
19 that's evidence that he discussed what's in the Conclusion
20 with her.

21 MS. SIMMONS: The Conclusion and the paragraph
22 on page 2, Your Honor, yes.

23 THE COURT: Well, she doesn't say. She doesn't
24 say she discussed the paragraph -- the natural reading of
25 the questioning, did you discuss these concepts with

1 Martorello is that there's an antecedent question, and the
2 antecedent question is the Conclusion paragraph.

3 MS. SIMMONS: He'll say yes, Your Honor.

4 THE COURT: All right.

5 Now, what part of the Conclusion paragraph
6 supports his informed belief as reflected in ECF 1257.

7 MS. SIMMONS: The underlined sentence.

8 THE COURT: All right. "Under applicable tribal
9 law, DCTF's activities are legal and the process -- proper
10 basis for delivery of consumer finance products to
11 consumers," right?

12 MS. SIMMONS: Yes.

13 THE COURT: Okay.

14 MS. SIMMONS: And the final sentence,
15 Your Honor.

16 THE COURT: And the final sentence begins?

17 MS. SIMMONS: "It follows."

18 THE COURT: "It follows that unless and until
19 Congress explicitly abrogates tribal sovereignty in the
20 arena of short-term online lending, loans made by Indian
21 tribes within their sovereign powers and pursuant to
22 tribal authority, procedures and regulations should --
23 should be deemed lawful."

24 All right. I've got those.

25 All right. I gotcha. I understand what we're

1 saying.

2 Basically, she thinks tribal law applies and is
3 lawful for consumer finance products, and she told him
4 that, based on this.

5 All right. So leads us to the next exhibit. Is
6 that LL?

7 MS. SIMMONS: It is, Your Honor.

8 THE COURT: And that's another one that's not --
9 not addressed. The address is redacted. To who is -- to
10 whom is it addressed? Mr. Louis Hoch, president and COO
11 of what?

12 MS. SIMMONS: I believe it's also Payment Data
13 Systems.

14 For this one, Your Honor --

15 THE COURT: It's what?

16 MS. SIMMONS: I believe that's also Payment Data
17 Systems.

18 THE COURT: Alto, A-L-T-O?

19 MS. SIMMONS: Also Payment Data Systems.

20 THE COURT: Two words, Also Payment or one word?

21 MS. SIMMONS: The prior letter was to Payment
22 Data Systems. This one is as well.

23 MR. GIVEN: In addition.

24 MS. SIMMONS: In addition.

25 THE COURT: All right. And what evidence is

1 there that -- there's no connection between Mr. Martorello
2 and Payment Data Systems.

3 MS. SIMMONS: We were not able to locate an
4 e-mail in the record for this one.

5 THE COURT: So this one is not shown to go to
6 Martorello?

7 MS. SIMMONS: Correct. We were not able to
8 locate that.

9 THE COURT: All right.

10 All right. That brings us to MM.

11 MS. SIMMONS: Yes.

12 THE COURT: A memo -- is it warm in here to you
13 all, stuffy?

14 MR. GIVEN: It is.

15 THE COURT: Could you see if they could do
16 something to let us have some air?

17 All right. MM, Tribal Lending Client from
18 Rosette, January 22, 2014. Summary of *People v. MNE*.
19 Okay. So what about this?

20 MS. SIMMONS: So, Your Honor, for this one, the
21 parties stipulate that there is a cover e-mail that shows
22 that Martorello received this.

23 THE COURT: All right. Is that right?

24 MS. KELLY: That's correct, Judge.

25 THE COURT: And what part of it informed his

1 belief as set forth in 1275, what part of the document, so
2 I can know what we're talking about?

3 MS. SIMMONS: So the -- the section of the memo
4 that says that --

5 THE COURT: Page?

6 MS. SIMMONS: Bates stamp 6117.

7 THE COURT: 6117. That's the second page of it?

8 MS. SIMMONS: Yes.

9 THE COURT: Okay. And where?

10 MS. SIMMONS: So it's the section that says
11 that --

12 THE COURT: What paragraph, starting with? That
13 directs me to --

14 MS. SIMMONS: The header begins 1.

15 THE COURT: All right.

16 MS. SIMMONS: And it says, "The California Court
17 of Appeal expressly states that revenue sharing between
18 tribes and their lending parities has no impact on whether
19 an entity is an arm of the tribe."

20 THE COURT: And so that doesn't help me much
21 understand how it informs his belief on anything. So
22 could you help me?

23 MS. SIMMONS: My understanding is that
24 Mr. Martorello will testify that something like this
25 informed his understanding that the -- that the revenue

1 split in his servicing agreement with Red Rock is
2 consistent with this concept.

3 THE COURT: So what? Why does that -- why does
4 that inform the belief at the beginning of the
5 statement -- at the paragraph at the beginning of page 1,
6 1275, that it's legal, as opposed to equitable? I don't
7 understand how it's relevant.

8 MS. SIMMONS: If the entities -- the tribal
9 lending entities were arms of the tribe, that would
10 support the position that tribal law rightfully applies to
11 the consumer loans.

12 THE COURT: Oh, so this shows that tribal law
13 applies? That's what the purpose is is to show that
14 tribal law applies.

15 I don't discern that from this heading, but if
16 that's what you're saying it's being offered for, I'll
17 understand what you're saying. So that's tribal law
18 applies. All right.

19 And what part of any -- is there any part other
20 than the heading number 1 that goes to that end? I
21 understand how it relates to his belief now. So is there
22 anything else in this document other than number 1?

23 MS. SIMMONS: The fact that --

24 THE COURT: Page?

25 MS. SIMMONS: The next page --

1 THE COURT: Paragraph? What?

2 MS. SIMMONS: The next page, Your Honor. 6118.

3 THE COURT: All right.

4 MS. SIMMONS: And the heading itself, number 2.

5 THE COURT: "The Court appears to have provided
6 an objective arm of the tribe test, rather than a
7 subjective test, to determine whether the lending entities
8 were entitled to sovereign immunity." Why does that go to
9 the tribal law applicability?

10 MS. SIMMONS: So if you look at the paragraph
11 underneath the numbers, Your Honor --

12 THE COURT: Give me the --

13 MS. SIMMONS: -- the bottom paragraph of 6118.

14 THE COURT: "With this holding"?

15 MS. SIMMONS: Yes.

16 THE COURT: "With this holding, the Court
17 provides a set of criteria for tribal entities in order
18 for them to avoid state regulatory authority. It is our
19 opinion that all the lending clients are properly
20 structured to meet these three prongs."

21 So, again, that's that tribal law applies; is
22 that right?

23 MS. SIMMONS: Yes.

24 THE COURT: Okay.

25 All right. There --

1 MS. SIMMONS: Or rather, that state law does not
2 apply.

3 THE COURT: Well, the three prongs that are
4 articulated in the preceding section all talk about tribal
5 law. So it's both that tribal law applies and state law
6 doesn't; is that right?

7 MS. SIMMONS: Yes.

8 THE COURT: All right. Is there any other part
9 of this document that is pertinent to inform his belief on
10 that or any other forms?

11 MS. SIMMONS: Page 6119.

12 THE COURT: Which paragraph?

13 MS. SIMMONS: The second paragraph under point
14 heading 3 that begins, "Hence."

15 THE COURT: 3 is, "This decision weakens
16 de facto lender theories against non-trial third parties.
17 Hence, to the extent a state's de facto lender theory
18 rests on the fact that the non-tribal third party receives
19 the bulk of the profits, the theory is much weaker as a
20 result of this case."

21 So is that -- what is that as to the
22 applicability of tribal law and not state law again?

23 MS. SIMMONS: Yes, Your Honor. It supports the
24 theory that the economics, again, in the servicing
25 agreement, would not have been a basis to set aside the

1 ability of the tribes to lend under their own law.

2 THE COURT: Okay. So it's that the split does
3 not itself render the lending operation non-tribal in
4 nature and so it -- this goes to support the view that
5 tribal law applies?

6 MS. SIMMONS: We think so, Your Honor.

7 THE COURT: All right. Gotcha. I understand
8 that.

9 All right. That brings -- anything else in this
10 document?

11 MS. SIMMONS: No, Your Honor, I don't think so.

12 THE COURT: All right. That brings us to
13 document CCC. What part of this document goes to inform
14 his belief as articulated on the first page of ECF 1275?

15 MS. SIMMONS: So it -- it's an e-mail itself to
16 Mr. Martorello. So he received it, and then if you turn
17 to page --

18 THE COURT: This is from Wichtman to Justin
19 Martorello, not Matt Martorello.

20 MS. SIMMONS: He's in the CC line.

21 THE COURT: Who's in the CC line?

22 MS. SIMMONS: Mr. Martorello's name appears in
23 the CC line.

24 THE COURT: Okay. I see. You're right.

25 All right. So what do we do? What part of it

1 informs his belief? Anything in the e-mail?

2 MS. SIMMONS: Not the e-mail itself.

3 THE COURT: All right. Then we go to the
4 document which is attached to the e-mail, which is -- just
5 a minute -- a document Tribal Lending Clients, April 14,
6 2015, Federal and State Lending Strategy, letter from
7 Rosette. Is that what we're talking about?

8 MS. SIMMONS: It is, Your Honor.

9 THE COURT: All right. Where in here -- what in
10 this document informs that belief?

11 MS. SIMMONS: So for this one, it -- it's the
12 fact that the tribe was engaging with the Consumer
13 Financial Protection Bureau and with the Department of
14 Justice.

15 THE COURT: Why does that inform his belief that
16 tribal law applies and that it's legal?

17 MS. SIMMONS: That these entities were aware of
18 the tribal lending operations and weren't taking adverse
19 action against these tribal entities.

20 THE COURT: Does it say that? I haven't read
21 all of it. I've seen this memo before, but I don't
22 remember in the context and I don't know the parts of it.
23 So tell me where it says that.

24 MS. SIMMONS: The memo itself just talks about
25 the various strategies. We're saying that Mr. Martorello

1 will testify that the fact of these types of activities,
2 the fact that the tribe was openly working with the CFPB,
3 openly discussing these issues demonstrates his

4 understanding that these were legal, those entities --

5 THE COURT: And that tribal law applied.

6 MS. SIMMONS: Yes. Stated in the inverse --

7 THE COURT: Wait. Wait. Wait.

8 MS. SIMMONS: Yes.

9 THE COURT: That who's working with these?

10 MS. SIMMONS: Rosette LLP.

11 THE COURT: The fact that Rosette is working
12 with whom?

13 MS. SIMMONS: The tribal lending entities.

14 THE COURT: Tribal lending entities or the
15 regulatory entities?

16 MS. SIMMONS: So the fact that Rosette was
17 working with the regulatory authorities presenting --

18 THE COURT: Wait a minute. The fact that
19 Rosette, working for the tribal lending entities, is
20 working with the regulatory agencies. What regulatory
21 agencies?

22 MS. SIMMONS: The ones that are referenced in
23 the memo itself are --

24 THE COURT: What are they?

25 MS. SIMMONS: There's headings. So if you look

1 at the --

2 THE COURT: There's the Consumer Finance
3 Protection Bureau. Who else?

4 MS. SIMMONS: The Department of the Interior.

5 THE COURT: All right. Anybody else?

6 MS. SIMMONS: And it says the Senate Committee.

7 THE COURT: Anybody else?

8 MS. SIMMONS: It says the White House, but I'm
9 not -- I have not seen documents showing that Rosette was
10 reaching out to the White House. So --

11 THE COURT: No. Okay. White House maybe.
12 Okay. And it shows what?

13 MS. SIMMONS: That they were engaging in these
14 efforts.

15 THE COURT: Okay. It shows they are engaging in
16 these efforts, but what is showing they are engaging in
17 these efforts go to prove that's relevant to his informed
18 belief?

19 MS. SIMMONS: The fact this these efforts were
20 being engaged in with the federal government on a
21 government-to-government basis informed Martorello's
22 belief that what the tribe was doing was not unlawful.

23 THE COURT: That tribal law applied?

24 MR. GIVEN: Yes.

25 MS. SIMMONS: Yes.

1 THE COURT: Okay. I see.

2 And there's no particular statement in here to
3 that effect. It's just that Martorello will testify; is
4 that right?

5 MS. SIMMONS: Yes.

6 THE COURT: So this requires foundation if it's
7 to come in, right?

8 MS. SIMMONS: Yes.

9 THE COURT: Foundation that he testified he read
10 it and understood it that way. So it needs foundational
11 evidence. In other words, the document by itself doesn't
12 show any such thing as what you're saying, but you might
13 get it in if he testifies.

14 MS. SIMMONS: Yes.

15 THE COURT: Okay.

16 MS. SIMMONS: And then if you go to page 1003 of
17 that same document.

18 THE COURT: Uh-huh.

19 MS. SIMMONS: Under the State Strategy.

20 THE COURT: Uh-huh.

21 MS. SIMMONS: It says, "California and New
22 Mexico."

23 THE COURT: What about it?

24 MS. SIMMONS: It says, "The MOUs between the
25 tribes and New Mexico Attorney General's Office."

1 THE COURT: What about it?

2 MS. SIMMONS: So Mr. Martorello will testify
3 that the fact that the tribe entered into a memorandum of
4 understanding with the state of New Mexico that would
5 permit government-to-government regulations supported his
6 belief that tribal law applied.

7 THE COURT: All right. I see.

8 All right.

9 MS. SIMMONS: And that's all for that one,
10 Your Honor.

11 THE COURT: GGG.

12 MS. SIMMONS: Correct.

13 THE COURT: This is a letter from Rosette
14 November 3, 2015, to the Chippewa Valley Bank.

15 MS. SIMMONS: For that one, Your Honor, we were
16 not able to identify anything in the record as of this
17 date that shows Mr. Martorello received this one.

18 THE COURT: All right.

19 HHH this is another Rosette letter to Amlaur
20 Credit Resources dated December 30th, 2015. Have we got
21 proof that it went to Martorello?

22 MS. SIMMONS: For this one, plaintiffs stipulate
23 that Mr. Martorello received it.

24 THE COURT: Stipulation?

25 MS. SIMMONS: Yes.

1 THE COURT: All right. And what in here informs
2 his belief?

3 MS. SIMMONS: So this letter is an opinion
4 letter to this hedge fund, and it goes through the various
5 documents that they -- that Rosette reviewed in drafting
6 this opinion.

7 THE COURT: So which informs his belief? There
8 are a lot of words in here. And I can't make the -- an
9 awful lot of them that I have read quickly don't do that.

10 MS. SIMMONS: So if you go to the final -- well,
11 the page of the letter Bates-stamped 11626.

12 THE COURT: Uh-huh.

13 MS. SIMMONS: And it's paragraphs 8, 9 and 10.

14 THE COURT: Roman numeral?

15 MS. SIMMONS: Roman numerals, yes.

16 THE COURT: Okay.

17 MS. SIMMONS: Rather, just the first couple
18 sentences of that particular paragraph, and then the
19 entirety of IX and X.

20 THE COURT: What?

21 MS. SIMMONS: I'm saying that it's not all of
22 paragraph VIII. It's just the first sentences.

23 THE COURT: "Borrower is an economic development
24 arm, instrumentality, and limited liability company wholly
25 owned and operated by the tribe. The tribe is a federally

1 recognized Indian tribe and enjoys tribal sovereign
2 immunity." Is that it? Is that what you're talking
3 about?

4 MS. SIMMONS: And then the next sentence as
5 well.

6 THE COURT: "As an economic development arm of
7 the tribe, borrower enjoys tribal immunity." That doesn't
8 show that tribal law applies.

9 MS. SIMMONS: So if you --

10 THE COURT: That has to do with the federal
11 sovereign immunity law.

12 MS. SIMMONS: And so those conclusions are in
13 paragraphs IX and X.

14 THE COURT: "Borrower has been licensed to
15 engage in consumer lending."

16 And they are enforceable under tribal law.

17 So this all goes to the applicability of tribal
18 law, then; is that right?

19 MS. SIMMONS: Yep.

20 THE COURT: All right.

21 All right. All right. Then we go to JJJ. And
22 that's to Eventide, which is one of Mr. Martorello's
23 companies. Any evidence he received it?

24 MS. SIMMONS: I'm sorry?

25 THE COURT: Is there any evidence he got this?

1 MS. SIMMONS: It's Bates-stamped. I don't think
2 plaintiffs are arguing that he didn't receive this
3 particular letter.

4 THE COURT: Do you stipulate he received it?

5 MS. SIMMONS: I don't want to --

6 MS. KELLY: It was produced by Mr. Martorello.

7 THE COURT: Say what now? I missed it.

8 MS. KELLY: It was produced by Mr. Martorello.
9 So we assume that he had possession of it at some point.

10 THE COURT: So you stipulate that he received
11 it?

12 MS. KELLY: Correct.

13 THE COURT: And what part of it goes to inform
14 his belief, as set forth in the first page of ECF 1275?

15 MS. SIMMONS: So, again, Your Honor, this letter
16 also goes through the numerous documents that Rosette
17 reviewed.

18 THE COURT: I want to know what text in here
19 does it.

20 MS. SIMMONS: So --

21 THE COURT: Tell me the text.

22 MS. SIMMONS: So beginning with -- at the bottom
23 of page 1, the merger agreement. The fact that they --
24 I'm trying to lay the foundation for why the later
25 portions of the letter would have informed his belief.

1 THE COURT: I don't want to know about why they
2 informed his belief --

3 MS. SIMMONS: Okay.

4 THE COURT: -- at this stage. I want to know
5 what part of it did inform his belief. Then we can get
6 into why. So tell me that first thing. What part of the
7 letter informs his belief? That's what we're dealing
8 with.

9 I mean, I see a number of places where there's
10 reference to tribal law of all kinds here. He gives
11 opinions on page -- beginning at the bottom of 7915 and
12 continuing to midway through 7918, and they seem all to me
13 to be pertinent to the question that tribal law applies.
14 Is that what you're offering -- is that -- are they the
15 ones?

16 MS. SIMMONS: Yes, Your Honor. All of these
17 opinions would support because it's showing the proper
18 formation of these entities that would permit tribal law
19 to apply.

20 THE COURT: And then how about, "The foregoing
21 opinions subject to the following exceptions,
22 qualifications and limitations"? Because that qualifies
23 all of it.

24 And it says in there, at page 7918, that, "Our
25 opinions only apply to the loan documents," and describes

1 what they are. "Our opinion specifically does not apply
2 to any other agreement referenced therein being executed,
3 delivered or for which performance is required by another
4 party."

5 And then it says, "We express no opinion as to
6 the laws of any jurisdiction other than the included
7 laws."

8 Again, that seems to me to be that tribal law
9 applies. Is that what -- is that the part of it we're
10 talking about? There's a whole lot of disclaimers after
11 that that go on for pages. Is there any disclaimer that
12 backs off of any of the opinions or that affects them?

13 MS. SIMMONS: Not that I saw, Your Honor. The
14 opinions themselves support Mr. Martorello's belief.

15 THE COURT: Okay. So it's these opinions are
16 that tribal law applies and the loans are lawful under
17 tribal law; is that right?

18 MS. SIMMONS: Yes, Your Honor.

19 THE COURT: All right. That brings us to MMM,
20 the last document from something. It's to Matt Martorello
21 from Rick Hackett. What is Hudson Cook, LLP? It's a law
22 firm somewhere?

23 MS. SIMMONS: Yes, Your Honor.

24 THE COURT: And this is History of Federal
25 Regulatory Intervention in Small Dollar Lending.

1 Okay. So what is it that informs his belief as
2 expressed on the first page of 1275?

3 MS. SIMMONS: So if you look, Your Honor, to the
4 paragraphs beginning underneath Summary Conclusions.

5 THE COURT: Okay. Hold on. Let me get there.
6 And the "Beginning in the late fall," or what?

7 MS. SIMMONS: Yes, those photographs.

8 THE COURT: What part of that paragraph?

9 MS. SIMMONS: Can I briefly provide Your Honor
10 just a background of what this memo is?

11 THE COURT: Yes, but --

12 MS. SIMMONS: I understand we have to get the
13 business of the specific part, but I feel like the
14 background would be helpful.

15 THE COURT: Well, doesn't it say what this is?

16 MS. SIMMONS: So this is a memo talking about
17 the history of federal regulation in small dollar lending.
18 But in particular, it talks about the federal government's
19 actions during Operation Chokepoint.

20 THE COURT: Yep.

21 MS. SIMMONS: And it's discussing that,
22 generally speaking, the -- the -- that Operation
23 Chokepoint was -- sorry. I'm just looking for the
24 paragraph.

25 THE COURT: As I read it, he's saying Operation

1 Chokepoint was premised on the basis that the tribal
2 lending was not lawful and it impacted the industry and
3 they have not recovered from the activities that began in
4 the fall of 2013, and he's writing as of 2017. That's the
5 way he read it, what I've read so far. Is there more?

6 MS. SIMMONS: So --

7 THE COURT: I don't know how this informs his
8 belief that tribal law applies, given that Operation
9 Chokepoint is essentially premised on the notion that it
10 is not. Maybe you can help me.

11 I think it sets the background for what
12 Operation Chokepoint was, but I don't think it informs his
13 belief as set forth in the first page of 1275.

14 MS. SIMMONS: May I confer with my colleagues
15 just a moment, Your Honor?

16 THE COURT: Yeah. Sure. This is a document I
17 have read before. It takes a while to trigger it in my
18 mind.

19 MS. SIMMONS: Thank you, Your Honor, for just
20 the moment.

21 So if you turn to page 11676.

22 THE COURT: Yes.

23 MS. SIMMONS: And if you look at the third
24 paragraph underneath the chart.

25 THE COURT: "Thus, by January 2016."

1 MS. SIMMONS: Yes.

2 THE COURT: All right. Let me look at it.

3 "Thus, by January 2016, it was reasonable to
4 conclude, and the market had concluded, that the threat
5 presented by Operation Chokepoint had run its course, or
6 was at least manageable."

7 MS. SIMMONS: Yes, Your Honor.

8 THE COURT: What does that inform with respect
9 to the opinion -- his belief that the tribal lending law
10 applied and that the loans were legal?

11 MS. SIMMONS: That the Operation Chokepoint was
12 targeting various entities to push them out of business
13 and that it had not specifically resulted in Red Rock --
14 well, at the time Operation Chokepoint was happening, it
15 began with Red Rock and then it moved to Big Picture.

16 THE COURT: So? What does that show on what he
17 says his belief is? I mean, it shows that the Chokepoint
18 tried but didn't succeed in shutting them down, but why
19 does that show that tribal law applies or that it's legal?
20 It just means that the government effort didn't succeed,
21 in this man's view.

22 MS. SIMMONS: That the -- because it supported
23 his understanding that the activities were not unlawful.

24 THE COURT: How? I understand you're saying
25 that. I'm saying how does it do that? In other words,

1 connect the logic of it to me. I don't see how it does
2 it.

3 MS. SIMMONS: We submit that the -- that the --

4 THE COURT: That a government agency tried and
5 failed doesn't necessarily mean anything to me. And if
6 it's marginally probative of that, then you've got to
7 consider whether -- what that does. I mean, what does
8 that do? That means that you consider letting that
9 evidence in. And if that evidence is in, then you
10 consider, under Rule 403, what that does to the case. And
11 so I'm having trouble. I see no relevance to it at all.

12 MS. SIMMONS: So, Your Honor --

13 MR. GIVEN: Can I just confer quickly?

14 MS. SIMMONS: So, Your Honor, there will be
15 other evidence that will be submitted that will show part
16 of it is the expert testimony of Todd Zywicki that will
17 show that not only -- that Congress and the CFPB itself --
18 and I believe also the -- I'm sorry -- the DOJ and the
19 FDIC themselves said that Operation Chokepoint was an
20 inappropriate action by the federal government and they
21 shouldn't have been undertaking those actions.

22 THE COURT: So what? What does that prove?
23 That somebody said that. Even if you can get that in,
24 what does it prove?

25 MS. SIMMONS: That Operation Chokepoint, in and

1 of itself, didn't --

2 THE COURT: But that's Operation Chokepoint.
3 That's not whether the tribal law applied or the loans
4 were lawful. That's that somebody made an administrative
5 decision to go the wrong way in enforcing the law.

6 MS. SIMMONS: Okay. So, Your Honor, we would
7 respectfully request to be able to use this particular
8 document for rebuttal.

9 THE COURT: Well, you can hold it for rebuttal
10 and offer if, in fact, it comes in, but it's not relevant
11 to his belief.

12 MS. SIMMONS: Understood, Your Honor.

13 THE COURT: Substantively, it's not relevant.
14 And if it is, it raises such additional issues as to
15 protract the trial, confuse the jury, and create the
16 possibility of severe prejudice that would overcome the
17 marginal probative value of the evidence proffered.

18 All right.

19 MS. SIMMONS: The last part, Your Honor, is the
20 sentence on page 11677.

21 THE COURT: One what?

22 MS. SIMMONS: 11677.

23 THE COURT: All right. Where is that?

24 MS. SIMMONS: It says, "We understand your
25 ultimate conclusion to be was it reasonable to predict

1 this outcome in January 2016? We believe a knowledgeable
2 observer of the regulatory interaction at that time would
3 say yes."

4 THE COURT: To predict what action? I don't
5 understand. To predict --

6 MS. SIMMONS: So the prior paragraphs are
7 talking about the CFPB's rulemaking authority. And my
8 understanding is that there were some concerns that the
9 CFPB was going to enact rules that would effectively
10 prohibit tribal lenders from operating.

11 THE COURT: Uh-huh.

12 MS. SIMMONS: And then they ultimately did not
13 do so.

14 THE COURT: The same ruling: It doesn't have
15 anything to do the applicability of -- it's relevant -- if
16 it even has marginal relevance to his belief, it is so
17 substantially prejudicial under 403 it stays out for the
18 same reasons I articulated as to the first "Thus, by
19 January 2016," et cetera, provision.

20 Okay. That takes care of all of those.

21 Now, that leaves us, I believe, with what,
22 having to do?

23 MR. GIVEN: Motions in limine, the defendant's
24 motions in limine.

25 THE COURT: Yes, in just a minute. I need to

1 see what we're doing there.

2 MS. KELLY: Judge, if I could --

3 THE COURT: Wait a minute.

4 MS. KELLY: Okay. Sorry.

5 THE COURT: Defendant's motions in limine are,
6 (1), Martorello's omnibus nonexpert motion in limine 1185;
7 is that right?

8 MR. GIVEN: 1186 is the memorandum of law that
9 actually is where they are laid out.

10 THE COURT: Right. But 1185 is the motion?

11 MR. GIVEN: Yes.

12 THE COURT: I have a note on this that says
13 "where is the draft?"

14 Was there a draft of this that got filed or is
15 this Document 1185 and its support 1186, is that all --

16 MR. GIVEN: 1185 was simply the motion. We
17 believe it did get filed, but, again, that was -- the
18 operative document where we have the discussion is 1186.

19 THE COURT: I understand that. So there's no
20 draft? I've got the final document here?

21 MR. GIVEN: Yes. That's my understanding.

22 THE COURT: All right. Have we completely
23 finished with plaintiffs' motions for summary judgment?

24 MR. GUZZO: We have, Your Honor.

25 THE COURT: All right.

1 All right. Let's now look at the defendant's
2 omnibus nonexpert motion in limine and its supporting
3 brief and response, and that would be ECF 1185, 86,
4 plaintiffs' response 1199, Martorello's reply 1231; is
5 that right?

6 MR. GIVEN: Correct, Your Honor.

7 May I proceed?

8 THE COURT: Please.

9 MR. GIVEN: Motion in limine number 1 is that
10 counsel shall not solicit evidence or make argument
11 regarding pejorative phrases such as rent-a-tribe,
12 rent-a-bank or scheme, and we believe that doing so would
13 violate both Rule 401 and 403 of the Federal Rules of
14 Evidence.

15 And as we note in the briefing, the Advisory
16 Committee Notes to Rule 403 make clear that use of
17 inflammatory phrases suggest a decision on an improper
18 basis commonly, though not necessarily, an emotional one.
19 Accordingly, the Court should grant this motion and
20 preclude plaintiffs from soliciting evidence or making
21 arguments of this pejorative nature. It's not relevant
22 and it's purely inflammatory.

23 THE COURT: I find that to be a really
24 remarkable argument in the face of the complaint in the
25 case and all the evidence in the case, and the basic

1 evidence is that there was such a thing as a rent-a-bank
2 organization. The rent-a-bank organization got shut down
3 and it led to the rent-a-tribe organization.

4 I don't think you can discuss any of the
5 evidence in this case, any of the memos in this case
6 without having some understanding of that fundamental
7 concept, which permeates the complaint, the answer and
8 virtually all the briefs, and much of the testimony.

9 MR. GIVEN: What about the word scheme?

10 THE COURT: That's different.

11 MR. GIVEN: Okay.

12 THE COURT: What about -- we'll deal with that
13 and see what they say about scheme. But as to the
14 rent-a-tribe and rent-a-bank, that's just part and parcel
15 of the evidence in the case, and I can give some kind of
16 limiting instruction that that's a short form description
17 for a particular set of circumstances, and you all can
18 tender that instruction, review it and I'll be glad to do
19 it and tell them they are to draw no adverse inference
20 from the use in the documents or the testimony of the use
21 of the terms themselves.

22 As to scheme, I don't know what the position is
23 of the plaintiffs. It looks like to me like they don't
24 really want to use the word scheme or not. They use
25 enterprise. So anyway, at this point, that's motion in

1 limine number 1.

2 What have you got to say, Ms. Kelly, on scheme?

3 MS. KELLY: Judge --

4 THE COURT: Is that -- has that got a number to
5 it or is that motion in limine 1?

6 MS. KELLY: It's part of motion in limine 1.

7 THE COURT: Yeah, motion in limine 1.

8 MS. KELLY: When we briefed it, we believed that
9 the evidence supports the use of the term scheme. We
10 noted that Judge Orrick in *Brice* allowed us to use the
11 word scheme there.

12 The evidence supports it, and we don't think the
13 Court should exclude the use of the word. However, as --
14 in terms of the rent-a-tribe or rent-a-bank, we're aware
15 that some people -- Native American tribes consider
16 rent-a-tribe to be pejorative in some senses.

17 THE COURT: Oh, you mean politically correct?
18 That's not what we are talking about. We're talking about
19 how a -- that's used in all of the authority.

20 MS. KELLY: That's right.

21 THE COURT: If that offends somebody, I'm sorry,
22 but that's -- that distorts the basic record in this case,
23 the issues in the case law, and it's -- I'm not going to
24 make a decision of relevance on the basis of the fact that
25 somebody might get their feelings hurt because of the use

1 of the tribe -- of rent-a-tribe or rent-a-bank. I mean,
2 it isn't pejorative related to the fact of Native
3 Americans at all. It is simply a description of a
4 financing vehicle. That's all it is.

5 MS. KELLY: I understand. Well, Judge Orrick
6 allowed the use of the words scheme, loan sharking,
7 racketeering and front to be used when the defendants in
8 that case sought to execute those terminology.

9 And Mr. Bennett provided the definition of
10 scheme, which is a plan or program of action, especially a
11 crafty or secret one, and it seems like scheme is a really
12 spot-on definition of plaintiffs' position of what
13 happened here. And we think that the case law we cited in
14 our brief supports the ability to use it, since the
15 evidence supports that such a scheme existed.

16 MR. GIVEN: May I reply, please?

17 THE COURT: Sure.

18 MR. GIVEN: This isn't Judge Orrick. This is
19 your court.

20 THE COURT: Well, I'm informed by what other
21 judges do.

22 MR. GIVEN: I understand, but we were not a
23 party in that case. We weren't involved in that case. I
24 don't think we're bound by that case. That may be
25 informative. Scheme, they use the word secret. Nothing

1 was secret about this.

2 If they're allowed to use the word scheme,
3 that -- that's so unfair and prejudicial it would be
4 inappropriate. I mean, I don't think rent-a-tribe or
5 rent-a-bank is appropriate. I'll take the Court's ruling,
6 but scheme is so prejudicial it would be wholly improper.
7 I feel very strongly about that.

8 THE COURT: How about loan sharking? You didn't
9 object to that. That seems to me loan sharking is a whole
10 lot worse --

11 MR. GIVEN: I object to loan sharking. I object
12 to anything pejorative like loan sharking, scheme,
13 criminal. Yeah, I object to all those things. I do.

14 THE COURT: Okay. All right.

15 I think the ruling by Judge Orrick in *Brice* is a
16 sensible one and that as long as it's not overdone, the
17 reference to scheme can be used in opening statement,
18 defined as a plan.

19 MR. GIVEN: Are we going to be allowed a
20 limiting instruction on that?

21 THE COURT: You can offer a limiting
22 instruction. I'll be glad to consider it. It would be
23 good if both of you could agree to it, but I'll consider
24 it.

25 So motion in limine number 1 is overruled.

1 MR. GIVEN: Okay. Motion in limine number 2.

2 THE COURT: Wait just a minute.

3 MR. GIVEN: Sorry.

4 THE COURT: The use of the terms are pertinent
5 here. They run throughout the documents. They run
6 throughout the case law. It is just a fact of the life
7 associated with this case that that's how the industries,
8 the literature, the experts and the decisional law all
9 relate to describe what's going on.

10 I think you can get to a point where you overuse
11 any of those terms, and if you overuse them, that's not
12 appropriate because not really what it's all about. You
13 don't want to get to the point at all where you create
14 prejudice by hammering on a particular term. So a
15 limiting instruction would be appropriate, and I'll
16 enterprise it at the time.

17 Motion in limine number 2.

18 MR. GIVEN: Counsel shall not solicit evidence
19 or make arguments that the Courts in *Otoe-Missouria Tribe*
20 *of Indians v. State of New York Department of Financial*
21 *Services* found or decided anything more than denying a
22 preliminary injunction. And I think that's straight out
23 of the fact. There was -- it was simply a preliminary
24 injunction. It is not controlling law. And we want to
25 avoid any implication or reference to that because that

1 would be inappropriate. It's not relevant. And it also
2 would be prejudicial, misleading, and confusing to state
3 or imply that that was some sort of ultimate finding on
4 the merits.

5 THE COURT: All right. Let me hear from the
6 plaintiffs.

7 MS. KELLY: Thank you, Judge. And we agreed in
8 our response not to characterize the *Otoe* decision as a
9 final merits decision because it wasn't. It was a ruling
10 on a motion for preliminary injunction that determined
11 that the tribes weren't likely to succeed on the merits at
12 that time, and it was affirmed by the Second Circuit.

13 We are fine discussing it that way. We think
14 it's significant and relevant because it shows
15 Martorello's involvement with the LVD and it explains his
16 conduct and wanting to restructure it. It's the story and
17 kind of the theme of the case for why things happened --

18 THE COURT: He doesn't object to you doing that.

19 MS. KELLY: Well, he did on reply.

20 THE COURT: Wait a minute.

21 You don't object.

22 MR. GIVEN: I don't object to them using that as
23 their narrative and we'll respond, but I don't want to
24 imply or infer that that's the law of the case somehow.

25 THE COURT: And you're not going to do that.

1 MS. KELLY: Yeah, that's fine.

2 THE COURT: All right. So the motion in limine
3 number 2 is denied as moot based upon the agreement of the
4 plaintiffs not to make the argument that either the
5 District Court or the Second Circuit opinion in
6 *Otoe-Missouria* found or decided anything -- was a final
7 decision. So it will be denied as moot on that basis.

8 Defendant's motion in limine number --

9 MR. GIVEN: -- 3.

10 THE COURT: Let me find out where it is first.
11 I've got to get there.

12 Okay. Go ahead. Now I'm there.

13 MR. GIVEN: Counsel shall not solicit evidence
14 or make argument suggesting that the *Galloway III*
15 settlement, the amount or fact of settlement demonstrates
16 the settling defendants or Martorello's liability. Based
17 on your ruling this morning, that must be -- that has to
18 be granted because they can't bring in the settlement if
19 we can't.

20 THE COURT: I think you're probably right, and I
21 hope she agrees with that.

22 Do you agree?

23 MS. KELLY: Yes, Judge.

24 THE COURT: Motion in limine number 3 is
25 granted.

1 MR. GIVEN: Motion in limine number 4,
2 Your Honor.

3 THE COURT: Yes. Excuse me. Let me get there.

4 All right. Go ahead.

5 MR. GIVEN: Thank you. Counsel shall not
6 solicit evidence or make argument about the dismissed
7 cases, the pending cases or even Eventide's bankruptcy
8 case. Again, Your Honor, that raises both issues of
9 relevance, hearsay and would be prejudicial, misleading,
10 confusing and a waste of time. I believe there's some
11 sort of stipulation on that, but --

12 THE COURT: Just a minute. Excuse me just a
13 minute. Just so the record is clear, I had some
14 understanding. I understand what the Eventide bankruptcy
15 case is. What is -- is the dismissed cases the pending
16 cases, is that short formed in here somewhere so I know
17 what we're talking about?

18 MR. GIVEN: I think there were -- there were --
19 one second, Your Honor.

20 THE COURT: For example, let me make the point
21 to you. For example, they apparently intend to deal with,
22 in the spoliation issue, that there is a *Hengle* case and
23 that the *Hengle* case contract puts -- disputes
24 Martorello's view that the contract provision was a
25 standard provision. And I don't know if the *Hengle* case

1 is included in there or have I missed the definition
2 somewhere?

3 MR. GIVEN: I see. I've got it now. I
4 apologize.

5 THE COURT: Where is it?

6 MR. GIVEN: It's on page 5, because there were
7 other cases. There was --

8 THE COURT: Wait a minute. Let me get there.

9 MR. GIVEN: I'm sorry. Page 5 of Document 1186.

10 THE COURT: Yes, I'm looking there.

11 MR. GIVEN: Thank you.

12 THE COURT: All right.

13 MR. GIVEN: The dismissed cases --

14 THE COURT: Are what?

15 MR. GIVEN: -- are *Cumming, et al. v. Big*
16 *Picture Loans, et al; Robin v. Big Picture Loans, LLC, et*
17 *al.; and McKoy v. Big Picture Loans, et al.* Those are
18 defined as the dismissed cases.

19 THE COURT: Yes. Okay. All right. And then
20 what's the other one?

21 MR. GIVEN: And then the settling -- well, the
22 settling defendants were also dismissed from other cases,
23 including this case and, again, because that was the
24 settlement with the tribe.

25 THE COURT: Well, the term is the pending cases,

1 and that's --

2 MR. GIVEN: I mean the pending cases. I
3 apologize.

4 THE COURT: That's defined on --

5 MR. GIVEN: I'm sorry. The pending cases are
6 the other *Galloway* cases, which are -- it includes
7 *Galloway I*, *Galloway II*, the *Smith* case, which is pending
8 in the District of Oregon, and the *Duggan v. Martorello*,
9 which is pending in the District of Massachusetts. Those
10 are the pending cases.

11 THE COURT: So you don't want any mention of
12 those cases. Is that what you're saying?

13 MR. GIVEN: Correct, because we believe it's
14 confusing, misleading, and not relevant to this case.
15 This case has its own facts, its own merits. It has
16 different parties, not identical claims, et cetera.

17 THE COURT: All right. Let me hear from them.

18 MS. KELLY: Judge, we agree not to solicit
19 argument or evidence about cases that were dismissed
20 against Martorello or other members.

21 But for the pending cases, if Mr. Martorello is
22 allowed to assert that he believed what he was doing was
23 legal and he had a good faith basis, I think they
24 demonstrate, for impeachment purposes, that he should have
25 known that what he was doing was not legal, he was being

1 sued by multiple people, and he did not withdraw from the
2 alleged conspiracy or enterprise upon being put on that
3 knowledge. And so we would think it would be relevant for
4 that purpose. And so --

5 THE COURT: How would that take shape?
6 Mr. Martorello is on the stand. What do you ask him? How
7 is he coming out?

8 MS. KELLY: Do you still think what you did --
9 you still have a good faith basis today and you --

10 THE COURT: Wait a minute. So you ask him, Are
11 you a defendant in *Galloway*? Are you a defendant in
12 *Galloway I*? In *Galloway II*. Are you a defendant in
13 *Smith*? Are you a defendant in *Duggan*?

14 Yes, I am.

15 So then the next question is, In those cases, do
16 they allege what? That you're doing the same thing there
17 that you're doing here.

18 After reviewing those cases, getting sued that
19 many times, do you still -- you take the view -- you still
20 have the view that what you were doing was okay?

21 Is that what you're talking about doing?

22 MS. KELLY: Essentially, yes, Judge.

23 THE COURT: So then we're going to try what was
24 going on in those cases. Is that what happens? I mean,
25 doesn't that lead down a road to perdition?

1 MS. KELLY: It does, Judge.

2 THE COURT: I think maybe perdition is a good
3 enough reason not to do it.

4 MS. KELLY: Okay. Thank you, Judge.

5 MR. GIVEN: Thank you, Your Honor.

6 THE COURT: How about the bankruptcy of
7 Eventide? Do you intend to mention the bankruptcy of
8 Eventide?

9 MS. KELLY: Since it was the bankruptcy of
10 Eventide, I don't think it makes sense to do that here,
11 Judge.

12 THE COURT: All right. So the motion in limine
13 number 4 is granted because the plaintiffs agree not to
14 refer to dismissed cases. The Court has concluded that
15 Rule 403 calls for a denial, even if there is marginal
16 relevance to questioning about the pending cases, and the
17 defendant -- the plaintiffs have agreed not to pursue the
18 Eventide and ask questions about that, the Eventide
19 bankruptcy.

20 We're on motion in limine number 5.

21 MR. GIVEN: Thank you, Your Honor.

22 Motion in limine number 5, counsel shall not
23 solicit evidence or make argument about other cases
24 involving Native American tribes. And it runs along the
25 same line, that each case is different and, you know, we

1 are not -- there's no collateral estoppel or res judicata
2 as to Mr. Martorello. He's not a party to those other
3 cases. Every case stands on its own.

4 THE COURT: Wait a minute, now. Would this
5 motion, would that stop them from inquiring into
6 *Otoe-Missouria*, for example, into testifying that there
7 was that case, there was this result, and as a result
8 thereof, Martorello took certain actions? Would you
9 propose that that be kept out --

10 MR. GIVEN: Yes, we would.

11 THE COURT: Let me finish. Let me finish.

12 MR. GIVEN: I'm sorry.

13 THE COURT: -- that it be kept out pursuant to
14 this motion in limine; is that right?

15 MR. GIVEN: Yes, Your Honor. But if the Court
16 is going to allow that, we would at least like it limited
17 to the *Otoe* case and not a whole slew of other cases.
18 *Otoe* is different. And I agree that maybe a carve-out
19 here because he certainly knew about that and that was
20 part of the strategy. But that's different than -- their
21 expert is going to opine on all these other cases that we
22 certainly weren't a party to.

23 THE COURT: Maybe not.

24 MR. GIVEN: Well --

25 THE COURT: They may not.

1 MR. GIVEN: Well, if you exclude it, maybe not.

2 THE COURT: But -- but that comes up in the
3 adverse inference issue, it seems to me. Because they
4 identified -- and I have to find my notes. But they
5 identified the CashCall, the Hallinan, the Tucker, the
6 other cases that he knew about and that they imposed
7 liability and that prompted the insertion of the clause
8 that had his -- his information transferred to the tribe
9 and required the tribe, in the merger or acquisition
10 agreement, to destroy all the evidence, which was done.

11 So would that also not get brought into the --
12 into the case under this motion in limine?

13 MR. GIVEN: Yes. We don't think that's proper.
14 We think, again, that --

15 THE COURT: Well, excuse me. But haven't I
16 already ruled on that?

17 MR. GIVEN: We're bound by the ruling. I'm
18 just --

19 THE COURT: Well, does the analysis that's in
20 here warrant my -- the analysis you're making here,
21 warrant my revisiting what you think --

22 MR. GIVEN: I believe it does.

23 THE COURT: -- what you think was an erroneous
24 ruling?

25 MR. GIVEN: My apologies. Yes, Your Honor. I

1 don't think that it was appropriate.

2 THE COURT: All right.

3 MR. GIVEN: If --

4 THE COURT: Now, apart from *Otoe* and apart from
5 those cases that I mentioned in part with the adverse
6 inference issue, are there any other cases that we're
7 talking about that you don't want mentioned?

8 MR. GIVEN: Well, I'm not sure what else their
9 expert, Ms. Martin, is going to say. That will come up in
10 the motion to exclude.

11 THE COURT: Excuse me just a minute. You should
12 be sure what she's going to say because she filed a
13 report, she can't go beyond the report, and she was
14 deposed.

15 MR. GIVEN: I apologize.

16 THE COURT: Did she testify about other -- I
17 didn't really see that.

18 MR. GIVEN: She did, Your Honor, and I
19 apologize. I misspoke. I don't remember what other
20 Native American tribe cases she opined about, or tribes.
21 I don't have that at my immediate recall.

22 I will say this, Your Honor. If the Court is
23 going to allow counsel to solicit evidence or make
24 argument about other cases involving Native American
25 tribes, we simply then would want the opportunity for

1 Mr. Martorello to be able to testify why those cases were
2 different in his understanding and not applicable. I
3 think that's only fair.

4 THE COURT: Well, that's part of the mistake of
5 law defense.

6 MR. GIVEN: Correct.

7 THE COURT: Okay. All right. I see.

8 MR. GIVEN: All right.

9 THE COURT: I need to hear -- are you finished
10 with that one?

11 May I hear from Ms. Kelly or whoever is going to
12 argue?

13 So what are we talking about here is the first
14 question, Ms. Kelly? He says *Otoe* is a carve-out from the
15 motion, and I think he's correct to say that.

16 He says that the cases that you listed in
17 connection with the adverse inference motion in limine
18 that you had fall within motion in limine number 5 and
19 that I should take another look at that question because
20 of the motion in limine number 5, which, in essence, is
21 that its prejudicial. Is that right, sir?

22 MR. GIVEN: Correct. Thank you, Your Honor.

23 MS. KELLY: So, first, Judge, the cases that
24 we're talking about, to answer your question, are the
25 CashCall-type -- Cash Call cases, which are the *Butch Webb*

1 or *Western Sky* cases, *Scott Tucker*, *Hallinan*, *Think*
2 *Finance*, and *Hengle*. And the reason why we think that we
3 should be able to discuss these cases is because it gives
4 the context for the conduct in this case.

5 Why is Mr. Martorello working with the Native
6 American tribe? Why is he providing all these services,
7 you know, to the tribe? Why is he trying to change the
8 structure? Why is he sending so many e-mails very
9 concerned about regulatory issues or referencing certain
10 individuals? Why is he trying to sell the business to the
11 tribe? Why does the restructure occur?

12 And so the whole reason for the entire structure
13 of this enterprise is, first, to avoid detection and to
14 keep avoiding detection and, you know, make the business
15 seem a little bit different from this competitor. He's
16 comparing himself to these people in these cases all the
17 time. He is trying to avoid the regulatory --

18 THE COURT: Is this part of your case in chief
19 or is it in response to his mistake of law/good
20 faith/advice of counsel defense?

21 MS. KELLY: Well, it's --

22 THE COURT: You see, here's the problem. You've
23 got -- you can't approbate and reprobate any more than he
24 can. You have to be singing from the same hymnal on the
25 issues.

1 And I understand that you're making these
2 general statements, but they don't tell me why they have
3 anything to do with the case, and I have to understand
4 that in order to actually understand the right way to rule
5 on the motion in limine. And your brief doesn't address
6 it any more specifically than does his brief.

7 So I think what needs to be done is that you
8 need to file a paper that explains to me why it is, and
9 taking into account, the reasons why the evidence that you
10 have and the temporal connections to these cases,
11 *CashCall*, *Tucker*, *Hallinan*, *Think Finance*, and *Hengle*, to
12 this case. And it may be that some of them are pertinent.

13 For example, if he's trying to structure
14 something some way because of *CashCall* and you've got a
15 memo from him that says that, that's one thing. Isn't the
16 same thing -- is that basis there for *Hengle*? I'm not
17 sure -- I don't know.

18 MS. KELLY: So --

19 THE COURT: And I can't rule on this motion
20 without having a lot more specificity on each of the
21 cases. So you need to agree on which cases you're
22 fighting, and then we need to have a supplemental paper on
23 them because I think, Mr. Given, he could have done a
24 better job saying what's the problem here. You could have
25 done a better job saying it ain't a problem.

1 MS. KELLY: Right.

2 THE COURT: But for me to do the right job, I
3 need to hear from you both further. So I would allow
4 further briefing on that.

5 MS. KELLY: Okay.

6 THE COURT: And I think in this instance, it
7 probably is best if you go first and identify the cases
8 you're talking about so we know what you're talking about,
9 what from those cases is pertinent here and why. Then
10 Mr. Given can have a basis upon which to respond. Then
11 you can have a reply.

12 MS. KELLY: Yes, Judge. We can do that. And we
13 can also try to limit the ways in which we would want to
14 use it. I know one of the main ways was the reason for
15 the restructure.

16 THE COURT: Yeah.

17 MS. KELLY: So if we can limit it to just maybe
18 that reason or another, I think that might make things
19 easier.

20 THE COURT: There may be legitimate reasons why
21 it can be, and he may agree ultimately that the evidence
22 that you have leads to that result. But this is an
23 instance when --

24 MS. KELLY: I understand.

25 THE COURT: -- a full explanation of what's

1 going on here will help Mr. Given, you and me.

2 And so when do you want to file that?

3 MS. KELLY: Could we have a week?

4 THE COURT: What is a week? No, that's from
5 Downton Abbey, what is a weekend.

6 Okay. This is the 7th. No. This is the 8th,
7 right? So that would make it the 15?

8 All right. See that -- if you -- then he gets a
9 little bit of time, that's going to push us right up into
10 the pretrial.

11 MS. KELLY: We could do it sooner if we could
12 have until Wednesday next week.

13 THE COURT: All right. That's June the 14th.
14 You cut one day off and you think that's a big deal?
15 That's some kind of bended math. That's what that is.

16 MR. BENNETT: Tuesday the 12th.

17 THE COURT: Monday is the 12th.

18 MR. BENNETT: I mean Tuesday the 13th, Judge.

19 THE COURT: Tuesday the 13th at 5:00.

20 MS. KELLY: Okay.

21 THE COURT: Response, Mr. Given?

22 MR. GIVEN: Wednesday 5:00?

23 THE COURT: Wednesday, the 14th?

24 MR. GIVEN: Two days later, 5:00.

25 THE COURT: Well, that would be June 15th.

1 MR. GIVEN: Oh, I thought somebody said Monday.
2 My apologies.

3 THE COURT: June 15th, 5:00.

4 MR. GIVEN: Thank you.

5 THE COURT: And then we have a reply.

6 MS. KELLY: We'll limit it, yeah.

7 MR. GIVEN: Your Honor, I have a potential
8 solution. I'll just offer it to the Court, and I think
9 there's one --

10 THE COURT: You're settling the case?

11 MR. GIVEN: Pardon?

12 THE COURT: You're settling the case? Is that
13 the solution?

14 MR. GIVEN: No. We'd love to. But I think,
15 Your Honor, one of our concerns is that -- if they would
16 limit it -- if she can identify what e-mails or documents
17 that Mr. Martorello has or has produced that mention those
18 cases, I think that's fair game. But otherwise you're
19 squeezing the toothpaste out of the tube you'll never get
20 back if you talk about those other cases.

21 So I would request that as part of their
22 briefing, if they can identify the documents or e-mails
23 where those cases are provided to Mr. Martorello, I think
24 that's fair game.

25 THE COURT: Or where he knows about them.

1 MR. GIVEN: Right. That means he knows about
2 them, and that could -- that then lays a foundation, did
3 this affect your decision. I think that's fair game.

4 THE COURT: Can you do that, Ms. Kelly? Do you
5 think?

6 MS. KELLY: Yeah. We're giving them our
7 exhibits today, and we'll just highlight the ones that --

8 THE COURT: And you mention them in the paper
9 you're going to file.

10 MS. KELLY: Yep.

11 THE COURT: All right. That makes sense.

12 MR. GIVEN: And then the other thing,
13 Your Honor, is *Hengle*. Again, maybe it will be if there's
14 something to Mr. Martorello. My timing might be off, but
15 I thought *Hengle* was filed after this case.

16 THE COURT: I did, too.

17 MR. GIVEN: So if that's the case, it would be
18 kind of hard to rely on that back in 2015.

19 THE COURT: Or at any time going forward.

20 MR. GIVEN: Correct. Exactly.

21 THE COURT: I don't know how *Hengle* comes in
22 either, but I'm sure she thinks that out carefully before
23 she missteps.

24 MR. GIVEN: Okay. Thank you, Your Honor.

25 May I proceed to number 6?

1 THE COURT: All right. So I'll see your reply
2 when?

3 MR. GIVEN: Two days later.

4 THE COURT: Yeah. You're going to have your
5 response on the 15th.

6 When am I going to see the reply brief?

7 He's filing Thursday, the 15th. You're filing
8 the 13th at 5:00. He's filing the 15th at 5:00. The 16th
9 is a logical date, and it gives you a free three-day
10 weekend because Juneteenth is Monday. So what do you want
11 to do?

12 MR. GUZZO: I think I'd take until Monday,
13 Your Honor.

14 THE COURT: You think you'll file on Monday.

15 MR. GUZZO: Yeah, just because it would be --

16 THE COURT: 5:00 Monday.

17 MR. GUZZO: That's fine. Thank you, Your Honor.

18 THE COURT: The 19th. Now, when you file things
19 at 5:00 Monday, you have to personally deliver the copies
20 to my house.

21 Please don't do that.

22 MR. GUZZO: I live pretty far from here,
23 Your Honor.

24 THE COURT: You have a car, don't you?

25 MR. GUZZO: No.

1 THE COURT: No.

2 Okay. That takes care of how we're going to
3 deal with number 5.

4 MR. GIVEN: Your Honor, counsel has stipulated,
5 on number 6, that that should be granted, with the Court's
6 approval.

7 THE COURT: Let's see what it says. I've
8 forgotten now what it is.

9 MS. KELLY: It's mutual, though.

10 MR. GIVEN: It's mutual, correct. It's about
11 personal knowledge, that shouldn't be allowed to testify
12 outside the personal knowledge --

13 THE COURT: Yeah. Okay.

14 MR. GIVEN: It just follows the Rules of
15 Evidence.

16 THE COURT: I just apply that as I normally
17 apply it. Okay.

18 MR. GIVEN: Thank you, Your Honor.

19 May I proceed to number 7?

20 THE COURT: Just a minute. That one will be --
21 actually, I think the right thing do with number 6 is to
22 deny it as moot by agreement of the parties.

23 MR. GIVEN: That's fine, Your Honor. Thank you.

24 THE COURT: All right. Just a minute.

25 We're going to number 7 now.

1 All right. Number 7.

2 MR. GIVEN: Counsel shall not solicit evidence
3 or make argument implying that there has been any judicial
4 finding that the conduct at issue in Operation Chokepoint
5 has been held illegal or improper. And that goes to what
6 Ms. Simmons was talking about earlier. You know, they can
7 talk about Operation Chokepoint. We can respond, but I
8 don't want them to imply or state to the jury the fact
9 that Operation Chokepoint existed, was a finding by the
10 federal government, a determination that the underlying
11 conduct of the tribes was illegal or improper.

12 THE COURT: All right. Let me hear what they
13 have to say.

14 Operation Chokepoint comes into evidence because
15 of testimony that it created some problems and that there
16 were reactions to it; is that correct?

17 MS. KELLY: That's correct, Judge. And in our
18 response, we agreed to say that we're not going to say
19 there was a judicial finding about Operation Chokepoint,
20 and we put in our response that we would fairly
21 characterize it as a campaign initiated by the Department
22 of Justice to force banks to terminate their relationships
23 with payday lenders.

24 THE COURT: That's how the Department of Justice
25 ultimately said it was characterized, didn't it?

1 MS. KELLY: Right. We said we were open to a
2 stipulation about a fair characterization and that that's
3 what we would state. We weren't going to say that any
4 court made any judicial opinions about it. And the *Brice*
5 court took up a similar issue and allowed the limited use
6 and mention of regulatory actions to explain defendant's
7 knowledge of, concerns about, and actions in response to
8 regulatory activity. And we think our proposal is
9 appropriate here.

10 And also --

11 THE COURT: Are you in agreement?

12 MR. GIVEN: I'm in agreement as long as, again,
13 we have the opportunity to respond about how
14 Mr. Martorello responded to Operation Chokepoint or the
15 others who discussed it with him.

16 THE COURT: However, there was no comment on the
17 merits vel non of the Chokepoint Operation.

18 MR. GIVEN: Correct.

19 THE COURT: Okay. So you all are going to reach
20 a stipulation?

21 MS. KELLY: Yep.

22 MR. GIVEN: We will. We'll submit something to
23 the Court.

24 THE COURT: All right. That will resolve it.

25 MR. GIVEN: I think that will be fine.

1 THE COURT: Motion in limine number 8.

2 MR. GIVEN: Counsel shall not solicit evidence
3 regarding the financial condition of any party. And,
4 again, Your Honor, we cited the *Kinsey* opinion that
5 parties are not permitted to argue to the fact finder's
6 potential economic sympathies or prejudices. Because what
7 they want to do is they want to put on their plaintiffs
8 and say, "We were so poor. We had no choice but to get
9 this loan."

10 That is not relevant to the underlying issue of
11 the legality of the loan or the damages sought. All that
12 does is create additional sympathy. That's not relevant,
13 and it would be prejudicial to get into their financial
14 condition. It's not relevant why they took the loans.
15 They took the loans. The numbers are going to be what
16 they are based on the data, but that would create
17 additional sympathy and we believe would be improper. And
18 we cited numerous cases that follow that theory.

19 THE COURT: All right.

20 MS. KELLY: And, Judge, as to this one, we agree
21 not to discuss the financial condition of Mr. Martorello
22 or the plaintiffs in general, but we believe that the
23 plaintiffs should be able to get a very limited background
24 of why they took out the loan.

25 THE COURT: Such as?

1 MS. KELLY: Such as, "I needed money to pay this
2 bill and so I went online and did this."

3 THE COURT: That's the end of it.

4 MS. KELLY: Exactly. And we agreed that -- when
5 we discussed that we're not going to put on testimony that
6 because I had this loan, I had all these other things
7 happen to me, but we should be able to give a small bit of
8 context that would be relevant --

9 THE COURT: Well, that context would be, "I
10 needed some money to pay bills and so I did this."

11 MS. KELLY: Exactly.

12 THE COURT: That's what you're saying?

13 MS. KELLY: Yes. Exactly.

14 THE COURT: You object to that?

15 MR. GIVEN: Yeah. I don't think it's relevant.
16 We stipulate they took the loans. I just think it's going
17 to lead to undue prejudice against our client.

18 THE COURT: I think a proper limiting
19 instruction can cure that. They can set the context as
20 long as you confine it to what she said.

21 MR. GIVEN: Okay.

22 THE COURT: However, I have this question
23 respecting this motion, and that is, that doesn't the --
24 do the damages include a request for punitive damages?

25 MR. GIVEN: No. It's a RICO claim, Your Honor.

1 And the case law -- and we can brief that. I think we
2 already did brief that. You don't get both RICO damages
3 and punitive damages on top of it because RICO --

4 THE COURT: No. I'm talking about the state
5 court claim, the --

6 MR. GIVEN: Well, that would be bifurcated,
7 Your Honor, in the second portion.

8 THE COURT: Well, that's what I'm trying to get
9 at. All damage evidence would come in a second trial.

10 MR. GIVEN: Correct. That's all I'm saying.

11 THE COURT: I mean a second stage.

12 MR. GIVEN: I agree. If you go to punitive
13 damages that are non-RICO punitive damages in the second
14 stage, that is an appropriate question. Not the first
15 phase.

16 THE COURT: RICO damages are what here? What
17 are your RICO damages?

18 MR. GUZZO: Your Honor, the RICO damages are we
19 believe -- and we can brief this if you'd like,
20 Your Honor, they are trebled automatically. It's
21 mandatory.

22 THE COURT: What are you trebling?

23 MR. GUZZO: The unlawful payments. So in this
24 particular case, I don't have the --

25 THE COURT: Well, the jury doesn't decide that

1 trebling.

2 MR. GUZZO: No. The Court would decide the
3 trebling.

4 THE COURT: The jury decides what's the quantum,
5 and the trebling occurs as a matter of law.

6 MR. GUZZO: That's correct.

7 THE COURT: Yeah.

8 MR. GUZZO: And so that's why we agreed to this
9 as to Mr. Martorello's financial condition, because we
10 don't think his net worth is relevant because the RICO's
11 treble damages is mandatory by law.

12 THE COURT: Well, what about the -- I think your
13 complaint says that you have -- you want punitive damages
14 in the state claim, doesn't it?

15 MR. GUZZO: So the state law claim under section
16 6.2305, the usurious interest is doubled.

17 THE COURT: Again, that's a mathematical?

18 MR. GUZZO: It's objective. It's not subjective
19 based on his net worth or other factors that would
20 typically be considered in a punitive damages calculation.
21 Like the reprehensibility of a defendant's conduct.

22 MR. GIVEN: I've got -- I think that's correct,
23 Your Honor.

24 MR. GUZZO: So that's our position.

25 THE COURT: And the unjust enrichment has

1 nothing to do with his economic interest.

2 MR. GUZZO: There would be -- well, there would
3 be no punitive damages associated with the unjust
4 enrichment condition.

5 MR. GIVEN: Correct.

6 MR. GUZZO: Correct.

7 THE COURT: All right.

8 MR. GIVEN: Kristi, I think we stipulated on 9?

9 THE COURT: So number 8, it's denied as moot by
10 your agreement; is that right?

11 MR. GIVEN: Yes.

12 THE COURT: On the record. By agreement on the
13 record and in the papers. And provided, however, that it
14 is allowed to the extent that the plaintiffs may explain
15 the mere fact that they needed money to pay a bill and
16 they borrowed the money.

17 MR. GIVEN: Right. We'll look at that.

18 THE COURT: All right.

19 MR. GIVEN: In number 9, Your Honor, I believe I
20 want to make sure that that is stipulated to or agreed to.

21 MS. KELLY: Judge, we agreed not to represent --
22 not to reference the misrepresentation hearing as long as
23 Mr. Martorello does not imply that there's sovereign
24 immunity.

25 But in reply, Mr. Martorello said that there

1 should be instruction that Ascension and Big Picture
2 received immunity. And so we don't agree to that. So as
3 long as you withdraw that --

4 MR. GIVEN: Yeah, I think we can withdraw that.
5 I'll confer, Your Honor, but I'm sure we can withdraw
6 that.

7 THE COURT: Well, let me help you. You should
8 withdraw it.

9 MR. GIVEN: Yes. Okay. So then I think that
10 would moot number 9, Your Honor.

11 THE COURT: So deny that as moot by agreement.

12 MR. GIVEN: Yes.

13 MS. KELLY: And the one thing, though, is that
14 when Mr. Martorello's testifying, if he testifies to the
15 same thing as he did in the same ways at the
16 misrepresentation hearing, we may want to use something
17 for impeachment purposes related to that.

18 MR. GIVEN: We -- sorry.

19 THE COURT: Go ahead. Excuse me.

20 MR. GIVEN: We have advised Mr. Martorello. We
21 don't intend to have him testify to any matters that the
22 Court found to be misrepresentations in the prior hearing.
23 Again, we weren't --

24 THE COURT: That cannot be allowed.

25 MR. GIVEN: Correct. We agreed. We weren't

1 counsel at the time, but we've read it. We understand,
2 and we've advised him.

3 THE COURT: Okay.

4 MR. GIVEN: Thank you.

5 And that concludes our motions in limine,
6 Your Honor.

7 THE COURT: Mr. Bennett.

8 MR. BENNETT: The only thing I'd say is that --
9 understand I'll be examining Mr. Martorello as adverse or
10 on cross -- that if he has been found to have -- if I have
11 a basis to impeach him, including through prior
12 inconsistent statements, not just simply not testifying
13 exactly the same way in the misrepresentation hearing,
14 then it may be that the -- the fact that he has been found
15 to be dishonest or have made misrepresentations itself
16 could come in in impeachment.

17 I can represent to the Court and counsel, before
18 I go there, I will make sure the Court and counsel know
19 that so that we can -- in context for whatever
20 Mr. Martorello says, and it changes --

21 THE COURT: Well, I understand. That is a
22 circumstance, to quote Judge Williams, that must abide the
23 event. So I'll wait until it happens, and we'll deal with
24 it if and when it comes up.

25 MR. GIVEN: Thank you.

1 THE COURT: And that will be -- motion in limine
2 number 9 is denied as moot by agreement on the record and
3 the Court will reserve judgment of the use of the
4 misrepresentation opinion should circumstances at trial
5 call for it so that everybody has -- we have a predicate
6 and we know what we are talking about.

7 That takes care of the motion in limine?

8 MR. GIVEN: Yes, Your Honor.

9 THE COURT: All right. Well, you have a motion
10 in limine on the plaintiffs' expert Ms. Martin, which
11 we'll take up.

12 MR. GIVEN: Yeah. That's -- the experts are
13 being handled by Mr. Taliaferro.

14 THE COURT: Yeah. I think what we'll do is
15 we'll take a 20-minute recess and then we'll proceed from
16 there on that motion, and then we've got other motions.

17 (Recess from 3:07 p.m. until 3:30 p.m.)

18 THE COURT: All right. Just a minute, please.

19 We've had argument and the presentation of
20 related evidence on the question of what has become --
21 what is variously asserted as the mistake of law, good
22 faith defense, and attorney-client privilege -- attorney
23 reliance on the advice of counsel.

24 The record on the reliance, it all merges into,
25 as everybody agrees, a mistake of law question. In fact,

1 when Mr. Martorello was asked to articulate what his basis
2 for belief was, a good faith belief, it's that the loans
3 were governed by the laws of the Lac Vieux Desert Band of
4 Lake Superior Chippewa Indians, the tribe, and applicable
5 federal law and were lawful.

6 To the extent that that relies on advice of
7 counsel, the record is fairly clear, from what has been
8 presented to me in the last two days and in the papers
9 related to the files on those issues, that there was never
10 any full disclosure about Martorello and what he did and
11 who was doing what to whom and when and how. He didn't
12 really ever receive any advice from anybody about it one
13 way or the other. He got general information about it.
14 He got it from lawyers. And he, in fact, says he's going
15 to really rely on nonprivileged material, which means he's
16 relying on things that don't come from the advice of
17 counsel. That's in one of the documents that was cited.

18 When all is said and done, the other thing that
19 is clear from the papers that have been submitted to me is
20 that Martorello was told that there was a high risk of
21 liability because of the illegality of the plan that was
22 under consideration, and basically he chose to believe one
23 side of it and roll the dice that he would be -- that he
24 was right. That's a mistake of law defense, no matter how
25 you cut it.

1 Viewing the record as a whole, what we have is a
2 mistake of law defense. There is no mistake of law
3 defense available in this case. And an opinion will issue
4 to that effect, but I think it's necessary that you all
5 know that and understand that at the earliest possible
6 time so you can shape the way you want to present your
7 case.

8 I need to sort out in my mind the two remaining
9 points of the plaintiffs' motion for summary judgment on
10 the first two points that were being made -- the way they
11 were structured in the opening brief. And that would be
12 whether Martorello knew about the scheme and whether he
13 furthered the scheme.

14 There is no -- there is no willfulness
15 requirement in the civil RICO statute, as is evidenced by
16 the decisions that we referred to the other day in the
17 Second Circuit, the Third Circuit, and the Eleventh
18 Circuit, and in the cases that were otherwise cited,
19 including the *Mao* case in this court.

20 There is, however, a knowledge requirement that
21 must be dealt with, and I think that Mr. Guzzo probably
22 articulated it very well in the transcript, and I've asked
23 for that. I'll look at it. But you all need to give me
24 the instructions that deal with the extent to which the
25 knowledge is involved, and that has to do with the

1 predicate offense of violating the statute.

2 And an opinion on all of that will obtain
3 forthwith, but you need to know it so that you can prepare
4 for trial.

5 I feel like I've been fully briefed on it, maybe
6 more than is necessary, but I was concerned to make sure
7 it was done right. So I'd rather have more than less, and
8 I appreciate the assistance you gave me in assessing the
9 questions.

10 I think it's important also, in assessing the
11 expert testimony, as to whether there's a mistake of law
12 defense. And it has occurred to me that I can go through
13 these motions in limine on the experts or I can let you
14 all go through them and determine that given that that's
15 the ruling, what actually can your experts say; (A), in
16 the plaintiffs' side, because some of what your witness,
17 Professor -- is it Martin?

18 MR. BENNETT: Martin, Judge.

19 THE COURT: What?

20 MR. BENNETT: Professor Martin is our witness.

21 THE COURT: Yeah, Professor Martin says seems to
22 me to be in anticipation of a mistake of law defense or in
23 rebuttal to it.

24 A lot of what the defendant's experts say is
25 keyed to a mistake of law defense and may, in fact, just

1 simply not be applicable for that reason.

2 And so I have thought that it might be a good
3 idea to let you go think about these rulings and narrow,
4 without waiving any position that you've asserted as to
5 whether the mistake of law, good faith or advice of
6 counsel is available. And with that understanding that
7 you're giving nothing up that you wish to appeal and that
8 you've made your record on it, but saying to yourself, as
9 you're looking through it, well, given the rulings that
10 have been made, this is all the expert can say, or the
11 expert can't say anything because that's the entirety of
12 the expert, and what you've done is to eliminate the
13 ability to put on the expert. And if that's the result,
14 then I think you owe it to yourselves, your client, and to
15 the system to say that.

16 Likewise, I think that to the extent
17 Professor Martin is striking in apprehendo, thinking that
18 there's a way to mute the advice of counsel defense, it
19 might well be that the plaintiffs don't want to put some
20 of that testimony on.

21 And in the past, what I have done in situations
22 like this is to ask the parties to take their expert
23 reports, leave them as they are, but show me by
24 highlighting that which you would put on, what opinions
25 you actually would want to put on, given the rulings. In

1 the old days, the highlighting was done by magic marker or
2 a highlighter. In these days, if you want to do it by the
3 computer, that's okay, too.

4 But I think what it will do is hone the
5 decisions on the motions in limine to shape where these
6 rulings have taken us, the rulings respecting the
7 applicable law, the rulings respecting the mistake of
8 law/good faith/advice of counsel defense.

9 How long do you think it would take you to do
10 that, thinking through your case? And I recognize -- it
11 would be a mistake to try to ask you to do it on the fly.
12 It would not be right for any of you to have to make those
13 decisions, and it wouldn't be helpful anyway because we
14 really wouldn't get anywhere.

15 How long do you think it would take you to do
16 it, Mr. -- okay, Mr. Taliaferro.

17 MR. BENNETT: Mr. Taliaferro, you only have one.

18 MR. TALIAFERRO: Well, I think it's the other
19 way, right?

20 MR. BENNETT: Five. Yes, that's right.

21 MR. TALIAFERRO: Your Honor, I was --

22 THE COURT: Mr. Taliaferro has several experts.

23 MR. TALIAFERRO: Well, I had a panicked two
24 minutes over there thinking about how I was trying to
25 advise my argument in light of your ruling just now. So I

1 do appreciate the offer to do that.

2 THE COURT: Well, I mean, I think it's only fair
3 for you to have to deal with what's on the table at the
4 time, which is why I have announced the result without the
5 reasoning.

6 MR. TALIAFERRO: And Your Honor is correct that
7 that will significantly streamline defendant's experts, to
8 the extent that some of them may need to be withdrawn.

9 I would --

10 THE COURT: They may need to be withdrawn or
11 they may -- their opinion may need to be changed.

12 But I will say this: The way the plaintiffs'
13 expert report reads -- and I haven't gone back and studied
14 the depositions. I've read the reports.

15 It may be that you need to trim up your case a
16 little bit, too. I don't know. But it will help -- I
17 think the first person to act has to be the plaintiff and
18 then you have the right to react. Because it may be that
19 there are parts of your experts that do remain,
20 notwithstanding --

21 MR. TALIAFERRO: I recognize that time is short.
22 The first thing that came to mind to me was through the
23 weekend, Your Honor, if that's possible.

24 THE COURT: Yeah.

25 MR. BENNETT: Your Honor, I -- responding to

1 that question, I've been -- I mean, I'll be working on
2 them immediately because I'm -- they're fresh in my mind.
3 If we had through the weekend on our side, that would be
4 great. I believe that it should be simultaneous and then
5 we can meet and confer. I don't believe they're
6 staggered. In fact, I don't think that there's direct
7 joinder between the defendant's experts and the
8 plaintiffs'. A couple of them are valuation experts, or
9 the like.

10 So I don't think that us acting or delaying it,
11 plaintiff acting, then defendant, then plaintiff respond
12 would be necessary. I'd appreciate it if we did do it --
13 over the weekend is what you suggest, Mr. Taliaferro?

14 That we both send to one another by noon Monday?
15 Is that doable?

16 MR. TALIAFERRO: That's doable.

17 MR. BENNETT: And then we report back to the
18 Court. And I have utmost confidence in these three
19 attorneys and our ability to work through reasonable
20 stipulations and narrow so that the Court's decisions --

21 THE COURT: Well, you are right, that there are
22 various and sundry experts that we can take care of
23 without -- without adjustment, I suppose.

24 Let me look at the -- I don't think that we can
25 deal with the defendant's motion for the plaintiffs'

1 expert, Professor Martin, until you sort through what
2 you're doing. So that means you've got to go -- you've
3 got to go first.

4 Now, the motions in limine of the plaintiffs as
5 to -- I guess which is the valuation expert? Cowhey?
6 Norman?

7 MR. TALIAFERRO: Your Honor, again, and I
8 apologize for just trying to think through this as it
9 comes.

10 THE COURT: Sure.

11 MR. TALIAFERRO: I believe that Beales, Brandon,
12 and Zywicki are significantly impacted by your court's
13 ruling on the mistake of law.

14 THE COURT: I think that's correct.

15 MR. BENNETT: I agree. Plaintiff agrees.

16 MR. TALIAFERRO: I believe that Norman and
17 Cowhey are much less significantly impacted by those
18 rulings.

19 THE COURT: If at all.

20 MR. TALIAFERRO: If at all.

21 THE COURT: I don't see -- you brought that up,
22 and I appreciate it. You're exactly right, they are not.
23 And we can hear argument on those today if you'd like to.
24 Would you like to go ahead and do that?

25 MR. BENNETT: Please.

1 MR. TALIAFERRO: I think we should keep this
2 thing moving, Your Honor.

3 THE COURT: All right. And I do think -- we'll
4 work out a schedule for Brandon, Zywicki and Beales and
5 Martin. And I think probably it's a good idea for you to
6 approach it the way that you all talked about approaching
7 it and getting something in on Tuesday.

8 So let's take the Cowhey report, then.

9 Just a minute, please.

10 I guess I need to be put in the picture a little
11 bit. I don't -- I don't understand the opinions. There
12 are four. The fair market value of the business is sold
13 to the tribe by Martorello in 2016. Same for 2018. And
14 then the fair market value of the promissory note received
15 by -- that's the 300 million one; is that right?

16 MR. BENNETT: Yes, Judge.

17 THE COURT: In 2016 and 2018, and the fair
18 market value of the businesses sold in 2023. Why are
19 those -- why is that pertinent to anything in the case?

20 I think I need to hear from the defendant first,
21 just to put me in the picture. You all are far ahead of
22 me in the knowledge, and I've read these materials, but
23 I'm still not quite sure I understand it.

24 Can you help me with that, Mr. Taliaferro, as to
25 why the fair market value in 2006 of the businesses sold

1 in 2016, 2018, and 2023 are something I need to pay
2 attention to -- or should come in? Excuse me.

3 And that fair market value is of what company?

4 MR. TALIAFERRO: That is the fair market value
5 of the businesses that were sold to the tribe, Your Honor.

6 THE COURT: And they are, so the record is
7 clear? SourcePoint and Bellicose?

8 MS. SIMMONS: It's just Bellicose.

9 MR. TALIAFERRO: At this point, it's the sale of
10 the Bellicose, Your Honor.

11 THE COURT: It's just Bellicose. Is that right?
12 Everybody agree?

13 All right. So not businesses, business.

14 MR. TALIAFERRO: Well --

15 THE COURT: All right. So Bellicose. And
16 Bellicose, just for the record, is what entity? It does
17 what in this whole plan, operation?

18 MR. TALIAFERRO: I'm sorry. I'm going to have
19 to lean on Ms. Simmons for an accurate description.

20 MS. SIMMONS: So the company that was sold was
21 Bellicose Capital, which was the holding company. And
22 underneath that was SourcePoint VI. My understanding is
23 there were various mergers that happened so that the
24 ultimate entity that was sold was Bellicose Capital. But
25 with that goes SourcePoint VI, which is the entity that

1 we've been discussing was the servicer.

2 THE COURT: So what is Bellicose Capital?

3 MS. SIMMONS: It was the holding company for
4 SourcePoint.

5 THE COURT: What does it do?

6 MS. SIMMONS: That's what it did. It was just
7 the holding company. It was the mechanism for -- it was
8 the holding company. That was the actual entity that was
9 sold. But along with that was the sale of SourcePoint's
10 IP, all of the -- the entire servicing entity itself.

11 THE COURT: All right. So the real issue is the
12 value -- why is the market value of those -- of the
13 Bellicose Capital and SourcePoint in 2016, '18 and '23
14 something that we should consider at all in this case?

15 MR. TALIAFERRO: Well, I think it --

16 THE COURT: Reliability.

17 MR. TALIAFERRO: It continues to go to the
18 management of the enterprise prong. And this goes to
19 plaintiffs' contention that the sale of the businesses was
20 simply a paper transaction by which Mr. Martorello
21 continued to exercise management and control over the
22 enterprise after the sales.

23 THE COURT: So it basically goes to show that --
24 these opinions as to the fair market value go to show that
25 the sale was not a paper transaction and that Martorello

1 did not continue in the affairs of the enterprise. Is
2 that what you're saying?

3 MR. TALIAFERRO: That is correct. I believe
4 this is plaintiffs' contention, although I'm happy to be
5 corrected if this is not the change, that the finances did
6 not change. The money and where it was going didn't
7 change after the sale in January of 2016.

8 Mr. Cowhey's --

9 THE COURT: What do you mean "the money"?

10 MR. TALIAFERRO: Well, they believe there was an
11 allocation of proceeds from the -- from the loan business.
12 The number that's been thrown out is the 98/2 split.

13 THE COURT: Percent.

14 MR. TALIAFERRO: Percent split and that after
15 the sale, that economic split continued.

16 THE COURT: Okay. And the fair market value of
17 the businesses sold in -- what it was in 2016, 2018 and
18 2023 goes to show that the split was different?

19 MR. TALIAFERRO: It goes to show --

20 THE COURT: How does it show that percent was
21 different? I don't understand.

22 MR. TALIAFERRO: It shows that the tribe
23 received something of value in excess of what it paid
24 through the promissory note.

25 THE COURT: Wait just a minute, though. Wait

1 just a minute, now.

2 It does not, then, go to prove that the split
3 was different. The split was the same. In other words,
4 how can the fair market value of the business in 2016,
5 2018 and 2023 go to show that the 2 percent/98 percent of
6 the revenues was different?

7 MR. TALIAFERRO: It's --

8 THE COURT: How does that --

9 MR. TALIAFERRO: I misspoke, Your Honor.

10 THE COURT: Okay.

11 MR. TALIAFERRO: The Cowhey opinion demonstrates
12 that the 98/2 split was not the full picture of economic
13 benefit received by the tribe.

14 THE COURT: But it does not go to show that the
15 split of revenues was different; is that correct?

16 MR. TALIAFERRO: Mr. Cowhey does not issue an
17 opinion on that matter.

18 THE COURT: Okay.

19 So it shows that there was -- it shows that the
20 tribe received things in addition to the 2 percent money
21 and benefits; is that right?

22 MR. TALIAFERRO: That's precisely correct,
23 Your Honor.

24 THE COURT: So what are those things?

25 MR. TALIAFERRO: Based on Mr. Cowhey's opinion,

1 they received an enterprise that had a fair market value.

2 THE COURT: And what was it?

3 MR. TALIAFERRO: He provides some different
4 valuation dates.

5 THE COURT: What was it in 2016, 2018 and 2023,
6 because that's the date his opinion relates?

7 MR. BENNETT: Respectfully, Judge, his
8 opinion --

9 THE COURT: I mean, that's when -- when the
10 opinions are summarized by both of you and by him, that's
11 what he says he's doing, the fair market value of the
12 businesses as of 2016 -- the time of sale -- I guess that
13 would be 2015 -- yeah, the sale closed in 2016?

14 MR. BENNETT: Yes, sir. But he has two reports,
15 the 2023 report, then the 2019. The 2023 report, which is
16 four years later, his -- his report is I can't tell you
17 anything because I haven't received any documents since
18 2019.

19 THE COURT: Well, that's an argument to one of
20 the issues.

21 I'm asking simply the question what does he say?
22 So as to 2023, the answer is he doesn't have it.
23 Mr. Bennett says zero.

24 MR. TALIAFERRO: That's correct.

25 THE COURT: Is that right?

1 MR. TALIAFERRO: That's correct.

2 THE COURT: Zero info. He's not saying it's
3 worth zero. He's just saying he doesn't have info.

4 Okay. What does he say it was worth in 2016?
5 In other words, what was the benefit or the value of the
6 enterprise?

7 MR. TALIAFERRO: Okay.

8 THE COURT: Or the value of the enterprise that
9 he says in 2016 and 2018?

10 MR. TALIAFERRO: His first opinion is that the
11 combined business had a value of \$189,307,000 as of the
12 combination date of January 26, 2016.

13 THE COURT: And of 2018, what was the value of
14 that business, fair market value?

15 MR. TALIAFERRO: That's his opinion 3, and it's
16 that as of November 30th, 2018, there was a combined
17 business value of \$102,251,000.

18 THE COURT: 102.2.

19 All right. Now, what's the probative value of
20 the information that -- the value of the enterprise; that
21 is, of the two businesses, was 190 and 102 million on
22 those dates. What's the probative value of that?

23 MR. TALIAFERRO: The probative value is that the
24 partnership --

25 THE COURT: The what?

1 MR. TALIAFERRO: The business relationship with
2 Mr. Martorello's enterprises was building something of
3 value for the tribe. And to the extent that there's an
4 assertion in this case that the tribe didn't benefit or
5 that they were being rented, that they were -- that
6 that -- Mr. Cowhey's report would suggest that that is not
7 the case and what they were doing was building something
8 of value for the future.

9 THE COURT: And what does -- what element of the
10 liability case does that go to -- and this pertains to the
11 1962(d) claim; is that right?

12 MS. SIMMONS: (c).

13 MR. TALIAFERRO: It's the (c) claim, the
14 management or control of the enterprise.

15 THE COURT: Really, what does it have to do with
16 that?

17 MR. TALIAFERRO: It shows that the tribe was --
18 it has probative value towards proving that the tribe was
19 gaining something of value through --

20 THE COURT: And what does that go -- what
21 element does that go to prove in the 1962(c) claim?

22 MR. TALIAFERRO: We believe it has probative
23 value to whether Mr. Martorello's entities were managing
24 or controlling the enterprise.

25 THE COURT: How does it do that? How does the

1 fair market value of the company show how that
2 Martorello's enterprises were controlling anything?

3 MR. TALIAFERRO: Or not controlling.

4 THE COURT: Or not.

5 MR. TALIAFERRO: And we would submit that the
6 tribe was learning the business, teaching itself the small
7 installment industry, and ultimately gaining an enterprise
8 of value.

9 THE COURT: I understand that. But that doesn't
10 explain why the fair market value of the company shows
11 that. I can understand that the administration of the
12 company was showing that the tribe was learning the
13 business. Why does the value of the company have anything
14 to do with showing that the tribe was learning the
15 business?

16 MR. TALIAFERRO: Well, I think it's evidence
17 that the tribe was able to manage the combined business by
18 themselves and was therefore learning the business.

19 THE COURT: So the fact that there was a value
20 of 190, roughly, in 2016, that declines to 1 million 2 in
21 two years shows that they are running the business
22 effectively. Is that the pint? I don't understand how
23 that works.

24 MR. TALIAFERRO: I don't know if I would show
25 the decline -- I mean, there's other factors.

1 THE COURT: There was. You say it's the value
2 of the two points -- at the two points in time and the
3 decline is rather significant. So how does it show that
4 they are learning the business?

5 It shows a lot of things, I suppose, that there
6 is a business. I just don't understand how this fair
7 market value stuff shows anything that's relevant in the
8 case. That's where I'm having trouble.

9 Is there anything else that that's probative of,
10 that the fair market value of the business is or have you
11 explained to me what it is and I'll hear their side of it?

12 MR. TALIAFERRO: I believe that given the
13 remaining issues in the case, I've explained what I think
14 the remaining --

15 THE COURT: All right. Then the next opinions
16 that he says are -- the second opinion is the fair market
17 value of the note. Now, the note was when? And that's
18 the \$300 million note, right?

19 MR. TALIAFERRO: It has a nominal maximum face
20 value of \$300 million.

21 THE COURT: Yeah. Okay. In -- at the time of
22 sale, that would be 2016 and 2018. So what does that --
23 what is his opinion as to the fair market value of the
24 note in 2016 and 2018, respectively?

25 I have to confess that I had some difficulty

1 sorting through exactly what he was saying, and I don't
2 want it to be misunderstood.

3 MR. TALIAFERRO: So his opinion is that the fair
4 market value of the Eventide note as of January 26, 2016,
5 was 164,578,000.

6 THE COURT: All right. And 2018?

7 MR. TALIAFERRO: His opinion is that the fair
8 market value of the Eventide note as of November 30th,
9 2018, was \$50,358,000.

10 THE COURT: And what does that information go to
11 show?

12 MR. TALIAFERRO: Just to be clear, what he
13 does -- Mr. Cowhey does with those two valuations is he
14 subtracts the value of the note from the value of the
15 enterprise. The difference for both of the two dates, the
16 difference is the value that the tribe received in excess
17 of payments to Mr. Martorello.

18 THE COURT: So that doesn't square. If the
19 value of the note is 164.5 million in 2016 and the value
20 of the enterprise was 189.4 million in 2016, the
21 difference would be what?

22 MR. TALIAFERRO: 24,729,000.

23 THE COURT: 24 million and what?

24 MR. TALIAFERRO: 729,000.

25 THE COURT: Okay. 24.7 million. And the

1 difference between 2018, which is 102.2 million, versus 50
2 is what?

3 MR. TALIAFERRO: The difference, as reported in
4 Mr. Cowhey's report, is \$51,893,000.

5 THE COURT: All right. And that is what? That
6 represents what?

7 MR. TALIAFERRO: That number reflects the value
8 that the tribe received in excess of what the tribe paid
9 at those points in time.

10 THE COURT: The excess of what the tribe
11 received versus what the tribe paid.

12 And what does that go to prove?

13 MR. TALIAFERRO: We believe it speaks to the
14 same issue, that the tribe was building something of value
15 and, indeed, got something of value in excess of what they
16 paid through the Eventide note.

17 THE COURT: Let's assume that that's true. What
18 does that show?

19 MR. TALIAFERRO: We believe it speaks to the
20 management prong of 1926(c) and that the tribe was
21 learning the business and gaining something of value.

22 THE COURT: All right. Does that take care of
23 why that's relevant, then, that it relates to the
24 management component in 1926(c)?

25 MR. TALIAFERRO: Yes, Your Honor.

1 THE COURT: And because the tribe was learning
2 business -- the business and gaining some -- what?

3 MR. TALIAFERRO: Something of value is I believe
4 what I said.

5 THE COURT: Something of value. Above what they
6 were paying on the note?

7 MR. TALIAFERRO: That's correct.

8 THE COURT: All right. All right. I understand
9 now. Let me hear from them.

10 MR. TALIAFERRO: I just --

11 THE COURT: Oh, excuse me.

12 MR. TALIAFERRO: I did get one note handed up to
13 me. This also, I think, shows the separation of the
14 businesses, that Eventide was just a note holder at this
15 point, following the sale.

16 THE COURT: That Eventide was a note holder. So
17 what? Eventide was nothing but a note holder to begin
18 with. Is that what you're saying? And they just remained
19 a note holder.

20 MR. TALIAFERRO: That's correct, Your Honor. So
21 to the extent that there's, you know, an assertion that
22 during the Big Picture loan, that Mr. Martorello is
23 personally liable, we think that this further shows the
24 separation of the businesses, that they were not
25 equivalent values. There's two things. At January of

1 2016, these ships kind of part and then you have the
2 business with its valuation. You have the note with its
3 valuation, and they are not moving harmoniously at that
4 point.

5 THE COURT: Okay. But if the value of what they
6 got, as of 2016, was 190 million and they paid a note,
7 signed a note for 300 million, it looks to me like they
8 paid more than it was worth.

9 MR. TALIAFERRO: And I think --

10 THE COURT: It doesn't show the converse of
11 that, and I'm having trouble grasping that notion. And it
12 looks to me like that to the extent that the note had any
13 payments made on it between 2016 and 2018, that the value
14 of the note far exceeded the value of the business. And
15 therefore -- I mean, am I -- is there something wrong with
16 that thinking?

17 MR. TALIAFERRO: We don't think the note is
18 \$300 million, Your Honor.

19 THE COURT: Well, everybody says it is. I'll
20 tell you this. Martorello says it's 300 million.

21 What is the note? Give me the note. Can
22 somebody show me the note, and what does it say?

23 MR. TALIAFERRO: We can get you a copy of the
24 note, Your Honor.

25 THE COURT: What does it say?

1 MR. TALIAFERRO: Well, it has a maximum value of
2 300, but it's subject to earn-out based on performance of
3 the entity.

4 THE COURT: Well, that just means how much they
5 collect.

6 MR. TALIAFERRO: No. It's paid off of how the
7 business is doing.

8 THE COURT: Well, that means how much they
9 collect.

10 MR. TALIAFERRO: Yes, but it's --

11 THE COURT: But it doesn't provide that it's
12 adjusted downward to \$190 million. And is there any
13 evidence about what they contemplated this maximum would
14 be less than the maximum? Is there any evidence in the
15 file about that?

16 MR. TALIAFERRO: There is some evidence about
17 what --

18 THE COURT: What is it? What does it say?

19 MR. TALIAFERRO: I want to say it's \$108
20 million.

21 THE COURT: In other words, the tribe signed on
22 for \$300 million worth of debt when they really thought it
23 was going to yield them 108 million? That's what they
24 were getting? Is that right? Yes or no.

25 MR. TALIAFERRO: No. No. I don't --

1 THE COURT: That's what it sounds like.

2 MR. TALIAFERRO: I believe this issue was in
3 the -- I mean this was discussed at the transcript in the
4 misrepresentation hearing. I don't have that in front of
5 me.

6 THE COURT: Well, that might help you, but it
7 doesn't help me.

8 But the point is there's a note and the value of
9 the note is 300 million. Now, you say it's a maximum.
10 That calls into question what is the state of the evidence
11 that -- as to what the actual value was that they were
12 getting. And you say that's 108 million. That's a big
13 difference. That's roughly, not quite, \$200 million. In
14 other words, the tribe's paying \$200 million more for the
15 note than it's actually getting.

16 Now, that may be -- I think I recall a tax
17 benefit discussion at the hearing, and that might be the
18 tax benefit to Martorello because, in fact, instead of a
19 \$300 million asset, he's getting a \$108 million asset.

20 But that doesn't go -- I don't understand why
21 it's relevant that the tribe got \$200 million -- paid
22 \$200 million for an asset that was worth 108.

23 That's how -- I'm having trouble how that shows
24 anything that's relevant to the case. Can you help me
25 with that?

1 MR. GIVEN: May I assist, Your Honor?

2 THE COURT: If you come to the lectern.

3 MR. GIVEN: Thank you.

4 Your Honor, what it was they had, it was a
5 maximum amount but it was an earn-out note. And that's
6 all the testimony.

7 And it wasn't just how much they collected from
8 consumers. "They" meaning the tribe. It was also based
9 on their expenses and what expenses they had to pay as
10 part of their operations.

11 So, again, there's -- I don't think there's a
12 dispute about how much was collected on the note so it was
13 a maximum. It's an earn-out. And that's very --

14 THE COURT: What does an earn-out mean?

15 MR. GIVEN: An earn-out note is a very common
16 note. What it means is that it is a note that is based on
17 the actual net earnings of the company. So often in
18 earn-out transactions -- they're very common -- is you say
19 I'm going to pay you up to this amount, but it's going to
20 be -- the actual realization will be based on the actual
21 earnings of the operation; i.e., the tribe.

22 THE COURT: But you're talking in gross
23 generalities. So whose expenses are you talking about?

24 MR. GIVEN: The tribe's expenses, Your Honor.

25 THE COURT: No, it isn't. You deduct from the

1 amount. Not the tribe's expenses. It's the servicer's
2 expenses.

3 MR. GIVEN: But the tribe --

4 THE COURT: -- according to what Martorello --

5 MR. GIVEN: -- purchased the servicing company,
6 Your Honor. That's the point.

7 When Eventide was created, as Mr. Taliaferro
8 told you, the tribe purchased the servicing company. They
9 then owned the entire operation.

10 THE COURT: That's SourcePoint.

11 MR. GIVEN: SourcePoint.

12 THE COURT: Okay. So it's SourcePoint's, not
13 the tribe.

14 MR. GIVEN: But they don't own SourcePoint.

15 THE COURT: Well, don't tell me it's the tribe
16 when, in fact, it's the SourcePoint.

17 MR. GIVEN: Okay.

18 THE COURT: Because the tribe has a lot of
19 assets other than the SourcePoint.

20 MR. GIVEN: Okay. The SourcePoint and the
21 tribal economic development expenses were deducted from
22 the earnings. Then that net --

23 THE COURT: And how is that shown in his report
24 as to what they were?

25 MR. GIVEN: Well, go ahead. I was just trying

1 to explain the note. I apologize. Thank you.

2 MR. TALIAFERRO: I'm sorry. Could you repeat
3 the question, Your Honor?

4 THE COURT: He says that the expenses of the
5 tribe, tribal council, or whoever it was, plus the
6 expenses of SourcePoint were deducted from the amount of
7 the note. So what were those expenses?

8 MR. TALIAFERRO: Your Honor, I actually do not
9 have that information in front of me.

10 THE COURT: I don't think that's in his report.
11 If it's there, I didn't see it. I mean, maybe it's there,
12 but I missed it.

13 Okay. So I think -- so what value -- what does
14 this show? What does this go to show that we're having
15 here?

16 As I understand it, the point is that they --
17 all this evidence goes to show the excess of what they
18 received against what the tribe paid; is that right?

19 MR. TALIAFERRO: That's correct, Your Honor.

20 THE COURT: Okay. And -- but the facts that you
21 tell me are that the tribe paid \$300 million, was on the
22 note for \$300 million, but actually only got \$108 million
23 after expenses and all of that. So I don't follow how
24 that shows that there's an excess of what was received;
25 i.e., the business, against what the tribe paid; i.e., the

1 amount it had to pay under the note.

2 MR. TALIAFERRO: And we're trying to locate the
3 note, Your Honor. I don't have any more information to
4 provide you other than --

5 THE COURT: All right. That's fine. Let me
6 hear from them, then, on this point.

7 MR. TALIAFERRO: Thank you.

8 THE COURT: Thank you.

9 Now, what is your objection to this testimony?

10 MR. BENNETT: It's irrelevant. And under 403,
11 it would be a sideshow that's so prejudicial that the jury
12 would have to go into the third reason, that this witness
13 is entirely incompetent to render the opinion that he
14 rendered. The reason --

15 THE COURT: I thought I decided that. If he's
16 not qualified, he doesn't testify. Isn't that my --

17 MR. BENNETT: Judge, yes. The reason that you
18 are having to go through these odd numbers and the
19 disparity between the reality and the make-believe that is
20 Mr. Cowhey is because he just made them up, literally made
21 them up. He said, "I made them up." He said, "I don't
22 have a formula. I don't have a matrix."

23 If I could first before -- the relevance
24 argument, I think, is obvious. The value of the company
25 itself would be prejudicial when there's so much more

1 relevant probative evidence --

2 THE COURT: Wait just a minute. You're
3 confusing relevance and prejudice. Relevance -- why is
4 the value of the company not relevant?

5 He says that it's relevant to show the -- we're
6 talking about two things now. We're talking about the
7 value of the company. He says that the value of the
8 company is to show that the tribe received things in
9 addition to the 2 percent of the revenue and that -- that
10 they were building something of value for the future and
11 that that's relevant to the 1962(c) claim because it shows
12 that Martorello companies were not -- Martorello's
13 companies were not controlling and that the tribe was
14 learning the business.

15 Isn't that what you said, Mr. Taliaferro?

16 MR. TALIAFERRO: That's correct, Your Honor.

17 THE COURT: All right. Now, respond to that.
18 That's what's on the table. So tell me.

19 MR. BENNETT: The Court has already ruled early,
20 the first day, that the societal benefit to the tribe
21 itself isn't relevant to a RICO claim. There's no element
22 of the RICO claim, for example, that measures whether or
23 not it was good to violate the law because the tribe
24 needed the money and needed the benefit and made off like
25 a bandit over the generous victim, Mr. Martorello.

1 This Court has already found that what --

2 THE COURT: So it's not relevant because what
3 he's arguing is that it got -- the tribe got a benefit and
4 that's not relevant to anything in any element of the RICO
5 1962(c) claim, right?

6 MR. BENNETT: Correct, except Your Honor has
7 used an indefinite pronoun, it.

8 It, the valuation, isn't relevant.

9 In addition, Mr. Cowhey's projected valuation of
10 what the tribe could benefit from the future is even less
11 relevant because there's two different things. The first,
12 Mr. Cowhey is saying he is guessing what the value of this
13 company will be from what the projected income will be in
14 the future going through to 2023. That valuation, if we
15 knew the actual valuation, itself is irrelevant.

16 In addition, Mr. Cowhey's guesstimate of what
17 happened in -- as of looking at the income that predates
18 to 2016 --

19 THE COURT: Wait just a minute.

20 You're saying that the future information, to
21 the extent he's present valuing and looking at a stream of
22 income, that's speculative and it's speculative, as I
23 understand your papers, because his assumption is that the
24 predicate of his opinion is that the loans will pay on the
25 high interest rate that is the face value and not the real

1 value; is that correct?

2 MR. BENNETT: That's correct. But that's not
3 the better argument.

4 The better argument is he is looking at the
5 income that existed prior to the sale. He's received that
6 income -- those income numbers from Mr. Martorello. Then
7 he literally manufactures -- he says that there is no
8 matrix or formula -- a discount rate to try to project the
9 risk of the tribe not actually earning that same income.

10 So you have the Martorello income, and you have
11 the income that the tribe may earn in the future. He
12 creates a discount rate comparing Big Picture Loan
13 business model to publicly traded companies, Dun &
14 Bradstreet, Experian, TransUnion, Synchrony, which does
15 the credit for a number of store credit cards, and a
16 number of legitimate publicly traded companies. And their
17 risk was 13 percent, and he added 10 percent to that.

18 And when I asked him, in two different
19 depositions, to explain it, he testified -- and it's
20 attached to our -- attached to our reply brief, which is
21 at 1232-1, he testified he had no formula, he had no
22 matrix. I showed him the Martorello estimate of
23 valuation. Mr. Martorello's 2012 e-mail said how would
24 you value? What's the discount rate you would use?

25 Mr. Martorello said it was in the hundreds, not

1 10 extra percent.

2 And I asked, Have you ever talked and estimated
3 the value with Mr. Martorello or these documents? Have
4 you ever reviewed any of the actual tax returns where
5 Mr. Martorello reported a value? Have you ever read any
6 of the valuations from the professional companies that
7 were paid to do a valuation?

8 Answer to all of those is no.

9 So the question of relevance is what is -- of
10 course, the valuation is irrelevant, and you've already --

11 THE COURT: You are confusing the concept of
12 relevance with the concept of qualification and
13 method and --

14 MR. BENNETT: The second is whether the
15 estimated value is itself relevant.

16 THE COURT: The value of the company?

17 MR. BENNETT: His valuation of the business.

18 THE COURT: Well, basically, as I understand
19 your point, it's that he used -- to value the business, he
20 used a discount rate, assuming public companies got to
21 13 percent, added arbitrarily 10 percent and came up with
22 that.

23 MR. BENNETT: Correct.

24 THE COURT: And that's not a proper method of
25 doing anything.

1 MR. BENNETT: It's not a proper method. It's
2 also -- even if I didn't challenge the qualification --

3 THE COURT: But I don't care. We're talking
4 about -- you have to be segregated in your talking, and
5 that is we're talking about the qualifications now. Is he
6 not qualified? Is that your point?

7 MR. BENNETT: He is not qualified.

8 THE COURT: Because if I find he's not
9 qualified, that's a ground. I don't have to go any
10 further.

11 MR. BENNETT: Understood.

12 THE COURT: If I find that he's qualified but
13 that the opinion is unreliable and it's unreliable or it
14 doesn't fit, then that's another ground. If I find that
15 it's not relevant, that's yet another ground.

16 MR. BENNETT: Agreed. But the point is that
17 he -- this is the method that he used to guess -- guess
18 what the value would be between 2016 and 2018, for
19 example.

20 And the problem is he never received, from
21 Mr. Martorello, who has possession of the actual income
22 numbers in '16, '17, '18, '19, '20, '21 -- sorry, madam
23 court reporter -- '22 and this year. Mr. Martorello has
24 the actual, real income numbers. There's no need to
25 estimate.

1 And that's a relevance issue. It is irrelevant
2 what Mr. Cowhey would estimate the income value to have
3 been when we know the reality of the business.

4 There's no evidence that --

5 THE COURT: It seems to me that that's a method
6 question.

7 MR. BENNETT: Well, we know the actual answer.

8 THE COURT: What evidence is there that the
9 method he used is appropriately used by others in his
10 field or by him in performing his work of valuing
11 companies?

12 MR. BENNETT: He testifies, and he does other
13 valuations professionally, that one of the methods -- and
14 this is not to betray my 35-year-old finance degree, but
15 income methods is one of the methods of valuation. We
16 will concede that. You can look at the projected income
17 into the future and discount the chance that that income
18 projection is not going to be fulfilled.

19 THE COURT: But the first thing you do is to
20 look at the income figures, and your point is he didn't.

21 MR. BENNETT: He did not.

22 THE COURT: He just took Martorello's word for
23 the income figures.

24 MR. BENNETT: Well, and he only looked at stale,
25 presale income figures.

1 THE COURT: Wait a minute. Did he look at the
2 figures or did he take Mr. Martorello's forum?

3 MR. BENNETT: He looked at the figures that were
4 given to him by Armstrong Teasdale.

5 THE COURT: All right. So he looked at figures
6 of some kind, but they were out of date or what?

7 MR. BENNETT: They were presale and --

8 THE COURT: What he basically says, as I
9 understand it, that if it were determined that state law
10 governed the allowable interest rates, he would have to go
11 back and recast the projections on the different lending
12 models, such that the whole model would have to be recast.
13 That's what he said.

14 MR. BENNETT: That's what he said.

15 THE COURT: Okay. So I decided that the state
16 law applies and that -- why doesn't that dispose of it
17 because his opinion no longer fits this case?

18 Are you aware of the concept of fit?

19 MR. BENNETT: Agreed, except that -- not to make
20 the defendant's argument. Their argument is that when
21 Mr. Martorello sold the business, he was giving a gift to
22 the tribe. He was giving them an asset that had far more
23 value than the 108 million that he reported on the tax
24 returns as the actual claim value.

25 And that -- that -- beyond anything, that's

1 irrelevant because it's not an element of any of the
2 claims. You know it's not an element of any of the claims
3 because this argument that is being made by Mr. Taliaferro
4 is not in opposition to our summary judgment motion. And
5 the only mention of the collar, or the valuation, is at
6 the very literal last paragraph before the conclusion of
7 the defendant's own summary judgment brief, which is --

8 THE COURT: I'm not talking about that brief.

9 MR. BENNETT: Understood. There's no -- if it's
10 such an important --

11 THE COURT: I don't have that in front of me.

12 MR. BENNETT: If it were relevant, someone would
13 be talking about it besides Mr. Taliaferro, Mr. Bennett,
14 and Mr. Cowhey. There is no element that exists in any
15 cause that we have where this could be relevant.

16 And I do want to also say as to prejudice,
17 because if there somehow were some modicum of relevance
18 that the benefit to the tribe could matter somehow, the
19 fact that you would have to have this projection of future
20 value going back as if Mr. Cowhey were there in 2016, in
21 contradiction to the actual valuations that existed,
22 itself would be confusing and burdensome to the jury to
23 try to figure out income method and then we'd have to have
24 a sideshow about --

25 THE COURT: Juries hear this information all the

1 time.

2 MR. BENNETT: We'd have to hear why did you
3 value it at 10 percent more than TransUnion and Synchrony.

4 That sideshow, and particularly when there isn't
5 any explanation for how the witness came up with that,
6 would --

7 THE COURT: The confusion doesn't arise out of
8 the hearing of the income method. It's a fairly
9 straightforward explanation that juries hear all the time.

10 The confusion and prejudice arises in the
11 selection of the discount rate, through the arbitrary way
12 that he did it, as I understand your argument. Is that
13 correct?

14 MR. BENNETT: That's correct.

15 THE COURT: Okay.

16 MR. BENNETT: We examined him as how he would
17 have calculated that. Did he know about -- his
18 explanation, frankly --

19 THE COURT: Was his testimony presented in the
20 *Brice* case?

21 MR. BENNETT: No.

22 THE COURT: Has it been presented anywhere else?
23 He gave the information about what his testimony was.

24 MR. BENNETT: He's not -- he certainly has
25 appeared in other cases as an expert witness. He has

1 never testified in one of these tribal lending cases.

2 THE COURT: All right. Anything else?

3 MR. BENNETT: Judge, the only -- the other thing
4 I would say about Mr. Cowhey is to the extent that the
5 question is of control; that is, this just shows that
6 Mr. Martorello was actually leaving the business because
7 he gave this giant asset away, the evidence that actually
8 is relevant to that and that would be impaired and in a
9 prejudicial way by this sideshow is the actual note itself
10 and the documents that governed the sale in which
11 Mr. Martorello maintained an iron fist, despite having the
12 note, and the conduct that we'll show at trial to show
13 that he more than participated, that even after the sale,
14 he was controlling pay, manager selection. He was active.

15 And so the idea that this valuation could do
16 anything other than unfairly prejudice or confuse the jury
17 in the face of actual direct evidence of his actions and
18 control and of the documentary evidence of that right to
19 control I think is, as well, dispositive.

20 THE COURT: Thank you.

21 Mr. Taliaferro, your response on Cowhey.

22 MR. TALIAFERRO: Just three brief points,
23 Your Honor. I think much of what Mr. Bennett spoke to
24 goes to the robustness of Mr. Cowhey's opinion, of which,
25 you know, plaintiffs have the right to cross-examine.

1 THE COURT: It goes to the weight of his
2 opinion.

3 MR. TALIAFERRO: It goes to the weight of his
4 opinion.

5 Just three quick points of clarification. The
6 2016 valuation is based on actual -- actual numbers, what
7 they were presale. And then Mr. Cowhey switched to
8 projected numbers for the subsequent opinions.

9 THE COURT: Well, he didn't give one as to 2023.

10 MR. TALIAFERRO: That's right.

11 We disagree that Mr. Martorello had sufficient
12 information to give to Mr. Cowhey to do a 2023 valuation.
13 The nature of what he received from --

14 THE COURT: He said that.

15 MR. TALIAFERRO: Okay. So I just wanted to --

16 THE COURT: The witness says I don't have enough
17 information to do it.

18 MR. TALIAFERRO: I just wanted to be clear.
19 When Mr. Bennett counted out data from 2017, 2018, 2019,
20 2020 -- I forgot how far he went. At some point, the
21 quality of that data decreased such that Mr. Cowhey could
22 not do the 2023 valuation. So that's --

23 THE COURT: All right.

24 MR. TALIAFERRO: And then the third point is on
25 the discount rate. Your Honor is quite right that an

1 income method with a discount rate is the gold standard of
2 valuation. And plaintiffs may quibble about whether the
3 discount rate was correct, but that's inevitable -- when
4 you have a publicly traded company, you can figure out
5 exactly what the discount rate is because you have books,
6 you have records.

7 When you have a privately held company, there's
8 some measure always -- and this is within the standard of
9 703. There's always an estimate of the discount rate and
10 then it's adjusted for risk.

11 And so we would take exception to the idea that
12 Mr. Cowhey just pulled it out of thin air. He took the
13 best comps he had and then he applied an additional
14 discount rate.

15 THE COURT: Where do you get that?

16 MR. TALIAFERRO: It's based on his experience.
17 It's relied on by people.

18 THE COURT: Where did he say -- where did that
19 experience come from? I didn't understand him to provide
20 that information. He just said it was based on his
21 judgment, I thought.

22 MR. TALIAFERRO: Well, his judgment --

23 THE COURT: Tell me where you're talking about
24 in the report, where he says that. Is it in the first or
25 second report?

1 MR. TALIAFERRO: It's in his original report,
2 his 2019 report.

3 THE COURT: Where is it?

4 MR. TALIAFERRO: I'm looking right now,
5 Your Honor.

6 It's on page 14 of his report.

7 THE COURT: Just a minute. I'll get there.

8 Page 11 he talks about valuations -- I mean
9 about methodologies.

10 Okay. Now, 14?

11 MR. TALIAFERRO: 14. He picks the guideline
12 companies?

13 THE COURT: He picks what?

14 MR. TALIAFERRO: The guideline companies. These
15 are companies that he believes are similar.

16 THE COURT: Uh-huh. Where are they? Where are
17 the guideline companies?

18 MR. TALIAFERRO: The guideline companies are
19 listed on page 14 of the report.

20 THE COURT: Uh-huh. All right. That's where --
21 so how did he -- he took the median, the mean, and the
22 upper quartile and the lower quartile and he chose the
23 median; is that right?

24 MR. TALIAFERRO: He took the upper quartile and
25 then he applied a business-specific risk premium of

1 10 percent.

2 THE COURT: He took the upper -- he reduced it
3 to 3 percent?

4 MR. TALIAFERRO: No. He went the other way. He
5 added 10 percent risk premium. And, of course --

6 THE COURT: He took the upper quartile of these
7 established companies to measure this fledgling business;
8 is that right?

9 MR. TALIAFERRO: And because the fledgling
10 business --

11 THE COURT: Then he added risk. And where did
12 he get the risk factor? I didn't see where he got the
13 risk factor.

14 MR. TALIAFERRO: He reports, in --

15 THE COURT: Where is it? Just tell me and
16 I'll --

17 MR. TALIAFERRO: Okay. If you look at the
18 paragraph that begins, "Based upon the cost of equity."

19 THE COURT: Right. Where is it?

20 MR. TALIAFERRO: Okay. If you go down to the
21 next to last line in that paragraph, it says "Ten
22 percentage points."

23 THE COURT: What's the sentence begin with?

24 MR. TALIAFERRO: "Having considered the relevant
25 facts and circumstances" --

1 THE COURT: -- "we concluded that a SCRP" -- is
2 what? What is the SCRP?

3 MR. TALIAFERRO: That's the --

4 THE COURT: Specific Company Risk Premium.

5 MR. TALIAFERRO: Yes, sir, Specific Company Risk
6 Premium.

7 THE COURT: All right. Thank you. That takes
8 care of it.

9 MR. TALIAFERRO: Thank you, Your Honor.

10 THE COURT: All right. Well, it is clear from
11 *Daubert* and *Kumho* and the rules themselves that there has
12 to be a relevance to the testimony of the expert and an
13 assessment of the reliability of it, and in addition, it
14 has to fit the case, the particular case.

15 In this instance, to begin, these figures are
16 being offered to show that the tribe received things of
17 benefit, in addition to the 2 percent share, and that they
18 got an enterprise and the value of the enterprise was as
19 shown in this evaluation. That is, in turn, offered to
20 show that they were building something of value and that
21 that's to show something about whether was a management
22 involvement. And that's the component of the 1962(c)
23 claim. The societal benefit to the tribe is not relevant.
24 It doesn't apply here. Judge Orrick found that in the
25 *Brice* opinion. The same is true here.

1 The problem with the report, though, far exceeds
2 that because I don't know that this is a societal benefit
3 to the tribe. I don't think that fits the same model. To
4 the extent it's offered to that end, it's not relevant.

5 But it's offered, I think, to show that this was
6 a transaction -- a business transaction that was a
7 legitimate business transaction, and I think it probably
8 has probative value to do that. The problem is there's no
9 method to it. There's no -- this is as close to a guess
10 in an application of a standard methodology that I've ever
11 seen.

12 There's no question that the income approach to
13 valuation is appropriate, but you have to have a sensible
14 way to apply the income valuation. So you have to use
15 actual figures of what the income has been across time in
16 order to do it. And he didn't do that. He began -- he
17 took some basic figures in the early days and then
18 projected them. That's sheer speculation. That's all
19 that it appears from his report.

20 And that is -- it is nothing that -- and he
21 admits as much. But how did he do that? He relied on
22 very significant publicly held companies to arrive at a
23 discount rate, took -- determined the median, the mean,
24 the upper quartile, and the lower quartile. From that, he
25 took the highest figure he could get, the 13.8 percent,

1 which was the highest possible figure in his analogy and
2 his method, without explaining why you would take the
3 highest method from a bunch of publicly held companies and
4 apply it to a company of this nature, which certainly
5 wasn't that kind of company.

6 And then he says, "Having considered the
7 relevant facts and circumstances, we concluded that a
8 SCRP, Specific Company Risk Premium, of ten percent points
9 was reasonable and appropriate." There's no explanation
10 whatsoever about why that is so, where 10 percent came
11 from, why it would be appropriate. It is sheer
12 speculation.

13 And the fact of the matter is given the
14 difference in disparities involved in the kinds of
15 companies involved in the evaluation and the application
16 of income method, what you have here is a classic example
17 of a report that just doesn't fit the facts of where it
18 is.

19 Fit is explained in both *Daubert* and *Kumho* as a
20 function of reliability and of relevance. And what
21 happens is as a result of the lack of fit, there's no
22 reliability here. There's no relevance here. It presents
23 sheer guesswork. And that's especially true given the
24 fact that he did review basic figures early on, but
25 acknowledged in his report or deposition that if it was

1 determined that state law governed the allowable interest
2 rates, he would have to go back and recast the projections
3 on the different lending models such that the whole model
4 would have to be recast.

5 Under this circumstances here, this report
6 cannot be considered reliable and does not fit the
7 component -- it does not match the fit component of
8 *Daubert* because the rule of law that applies here is
9 Virginia, not the tribal law. And therefore, the whole
10 economic model lacks a valid base whatsoever. And
11 testimony based on that tribal law concept and what the
12 company made under tribal law, what the income was, what
13 it would be projected as under the discount rate, and what
14 the actual discount rate would be simply are inapplicable
15 in this circumstance.

16 So the motion to exclude the testimony of
17 Cowhey, ECF 1184, I guess it is -- is that right?

18 MR. BENNETT: Yes.

19 THE COURT: -- is granted.

20 Now we have the Norman report.

21 What's the Norman report all about here,
22 Mr. Taliaferro? Can you take me through that?

23 I think I had an easier time dealing with it
24 than I did Cowhey, but I'm not sure.

25 And let's see. The Norman report is ECF 1182-1,

1 and the objection to it is 11 -- excuse me. I've got the
2 wrong book here. Eleven -- pardon me. I have so many
3 notebooks that I think I put the wrong one -- I'm sorry.
4 I'm having difficulty locating my briefing on those
5 motions. I have the expert reports, but I don't have the
6 briefs.

7 Norman report. What did I do with it? Let's
8 see. What's over here? I don't think -- this is Zywicki
9 rebuttal. I don't have that.

10 MR. BENNETT: We have copies.

11 THE COURT: I've got it. I just have so many
12 things here.

13 The brief on this is ECF 1181. The memo in
14 support is 1182. The opposition is 1200, and the reply is
15 1223, and the report of Norman is 1128-1.

16 So take me through a little bit of --

17 MR. TALIAFERRO: This speaks to Mr. --
18 Mr. Norman's report speaks to Mr. Martorello's liability
19 after the sale portion. So for the post --

20 THE COURT: After what?

21 MR. TALIAFERRO: After the sale of the business
22 in January 2016.

23 THE COURT: His liability for what?

24 MR. TALIAFERRO: For any of the loans made after
25 that period.

1 THE COURT: What does that mean, liability for
2 the loans?

3 MR. TALIAFERRO: Well, there's a contention that
4 Mr. Martorello's RICO liability extended into the Big
5 Picture period.

6 THE COURT: So it goes to RICO -- Martorello's
7 RICO liability for loans made after the sale of Bellicose
8 Capital and SourcePoint --

9 MR. TALIAFERRO: That's correct.

10 THE COURT: -- in 2016; is that right?

11 MR. TALIAFERRO: That's correct.

12 THE COURT: All right. And how does it show
13 that.

14 MR. TALIAFERRO: Just so the report is clear,
15 Your Honor, that same rebuttal of liability also applies
16 to the Virginia state claim and the unjust enrichment
17 claim.

18 THE COURT: The usury claim.

19 MR. TALIAFERRO: The usury claim and the unjust
20 enrichment claim.

21 THE COURT: All right. Let's take the RICO.

22 MR. TALIAFERRO: Okay.

23 THE COURT: How does his report address that
24 question is what I want to know.

25 MR. TALIAFERRO: Plaintiffs' contention in this

1 case is that the sale -- I don't want to put words in
2 their mouth, but they have essentially characterized it as
3 an artifice, or not a real sale, and that this was done
4 simply to paper over the ownership issue.

5 Mr. Norman's opinion makes three points about
6 the sale to explain that it was a bona fide sale and that
7 it was undertaken for legitimate business purposes.

8 THE COURT: Okay.

9 MR. TALIAFERRO: And here are the three opinions
10 that he offers.

11 THE COURT: Okay. Excuse me one minute. Pardon
12 me while I look for something here.

13 He has three opinions.

14 MR. TALIAFERRO: Yes, sir.

15 THE COURT: The Bellicose transaction is a
16 deferred consideration sale arrangement that is common in
17 middle-market, private business acquisitions.

18 Second, the specific terms of the Bellicose
19 transaction are common in deferred compensation,
20 seller-financed business transaction.

21 Third, the timing of the Bellicose transaction
22 provided additional tax benefits for Mr. Martorello.

23 Okay.

24 MR. TALIAFERRO: And as explained in greater
25 detail in Mr. Norman's report, a deferred compensation

1 sale arrangement is a common and typical way that
2 businesses are sold in this segment of the economy; that
3 is, middle market and not publicly traded.

4 So contrary to the assertions that plaintiffs
5 want to make in this case, the fact that no money actually
6 exchanged hands between the tribe and --

7 THE COURT: What does this go to? Excuse me.
8 Which count does this go to? The RICO count is --

9 MR. TALIAFERRO: It goes to the RICO count,
10 but it also --

11 THE COURT: Excuse me. There are RICO counts.
12 1962(c) or (d)?

13 MR. TALIAFERRO: We think it goes to both of
14 those.

15 THE COURT: Okay. And you've already said it
16 goes to -- it is addressed to the Virginia usury claim and
17 the unjust enrichment claim. All right. So how does
18 it -- where does it fit here to say that the deferred
19 consideration sales are not unusual?

20 MR. TALIAFERRO: So plaintiffs are offering the
21 position that -- I believe this is correct. Plaintiffs
22 are offering the case theory that the sale does not look
23 like a real sale because no money exchanged hands, that
24 there was certain seller covenants, and the timing all
25 suggest that this was a continuation of business as usual.

1 Mr. Norman offers his three opinions to support
2 necessary information for the jury to understand that the
3 arrangement of the sale is typical, it's not unusual, and
4 there's no reason to think or suspect, in the first
5 instance, that this was done as a sham transaction or an
6 artificial sale.

7 So it goes to the weight and the probative value
8 of the claims that plaintiffs would like to put on in this
9 case that this was done to perpetuate the enterprise and
10 to continue business as usual.

11 THE COURT: All right. Thank you. I'll hear
12 from them now.

13 That's what they're offering it for. There are
14 three opinions. What's wrong with them?

15 MR. BENNETT: Judge, they're not relevant. The
16 opinion -- the explanation that counsel is suggesting that
17 somehow this would go to rebut this strawman of it's a
18 nonexistent sale --

19 THE COURT: He says that you contend it's an
20 artifice, the sale was an artifice and that, in fact, the
21 business continued to march the same as it did before the
22 sale, and he's showing this is a standard business way to
23 effect a sale transaction in the first two opinions, and
24 the last one is just that Martorello gets a tax benefit,
25 got a tax benefit out of it, the way it was structured.

1 So we'll deal with that in a minute. But we're talking
2 about the first two opinions now.

3 MR. BENNETT: So, Mr. Norman, fine gentleman.
4 He will not testify, no matter what happens here. At the
5 end of his deposition, the last part of it,
6 Mr. Norman testified that it's a very typical aspect of
7 this type of seller finance, for the seller to maintain
8 control of the business. The reason is because the seller
9 wants to control. That's why they use this method of
10 deferred compensation financing. There's no way they'll
11 use him.

12 But --

13 THE COURT: What? I'm being asked to
14 deal with -- wait a minute.

15 MR. BENNETT: Yes, sir.

16 THE COURT: You know they're not going to use
17 him? I don't want to waste my time dealing with it.

18 MR. BENNETT: The question --

19 MR. TALIAFERRO: We are going to use him.

20 THE COURT: Okay. Are you going to use this
21 witness or not?

22 MR. TALIAFERRO: I may have missed a lunch
23 conversation, but I think Mr. Bennett may be speaking
24 hyperbolically.

25 THE COURT: So your plan is to use him.

1 MR. TALIAFERRO: It is.

2 THE COURT: Okay.

3 MR. BENNETT: The point is that the probative
4 value of these opinions, even assuming for a moment that
5 Mr. Taliaferro's theoretical use itself is relevant; that
6 is, his argument is that the fact that this is a common
7 way to structure a seller-financed business sale, that
8 that itself -- if this witness' opinion is that the
9 seller-financed deferred compensation method of conveying
10 ownership is common, there is no evidence to reach
11 Mr. Taliaferro's goal that the fact that it may be a
12 common method speaks in any way to the viability or the
13 correctness of Mr. Martorello's method of structuring the
14 sale.

15 He may have used this tax tool. That doesn't
16 mean he didn't maintain control. It doesn't mean he
17 didn't participate. It doesn't speak to that. It isn't
18 probative either way, at least from the evidence that is
19 here.

20 From the opinion itself, there's nothing in the
21 opinion that suggests that Mr. Norman would testify that
22 there was no longer participation from Mr. Martorello in
23 the enterprise or that he lacked control. It's not in
24 here, and it wouldn't go to 702. But Mr. Norman testified
25 a key aspect of the deferred compensation, seller-financed

1 tool that he's opining about is so a seller can maintain
2 control. He testified there were seven or eight different
3 businesses that he had worked on that were in that nature
4 and they were all seller controlled but one.

5 And so it doesn't speak -- there's nothing in
6 his report that speaks to a probative value to the
7 objective Mr. Taliaferro seeks.

8 THE COURT: That's in his deposition, not --

9 MR. BENNETT: True enough. But his report is --

10 THE COURT: Is that right?

11 MR. BENNETT: That's correct. It's in his
12 deposition. But the report is silent as to that big leap
13 that Mr. Taliaferro would make that the fact that you use
14 a particular tax tool, this particular method of sale,
15 somehow is probative of the lack of control or lack of
16 participation, which are the elements, or the lack of --
17 or the lack of operation as a lender under Virginia's law.
18 There's -- that's a giant leap. And there's nothing in
19 the report that suggests the application of these
20 conclusions that Mr. Norman attempts with what
21 Mr. Taliaferro claims to use.

22 That's not in -- again, you'll learn soon enough
23 it's not -- Mr. Norman is never mentioned or this argument
24 is never mentioned in their summary judgment. It's not
25 mentioned in any of the briefing in our summary judgment.

1 That's when you put your cards on the table. If this had
2 had any probative value, you would have heard about this
3 argument before now.

4 THE COURT: Well, I'm hearing about it now at
5 the time I scheduled to hear about it. So the issue is
6 the basis for your opposition.

7 MR. BENNETT: Yes, sir.

8 The other thing is that Judge Orrick heard and
9 considered, in *Brice*, a similar argument, which is the
10 argument that other companies have done it this way, that
11 there has been a business -- a business has been
12 structured this way by other companies and therefore, that
13 might have some probative value here.

14 But in this instance, the fact that
15 Mr. Martorello knows of other companies that have used
16 deferred compensation/seller-financed --

17 THE COURT: What did he find?

18 MR. BENNETT: He found that it was irrelevant.
19 He found that the witness -- the 702 witness couldn't so
20 testify. He also found that it would be confusing for the
21 jury under 403.

22 The other thing is this. Mr. Norman testifies
23 that there might have been tax reasons to do this.

24 THE COURT: Where does he say that in his
25 report?

1 MR. BENNETT: Yes, sir, in his report.

2 THE COURT: Where? You use that little word
3 that's troublesome to judges. "Might have been."

4 MR. BENNETT: It says -- IV is the Summary of
5 Opinions.

6 THE COURT: What page?

7 MR. BENNETT: Page 11 of his report, which will
8 be --

9 THE COURT: That's where the opinion is. Where
10 does he -- where does he talk about it later on so I can
11 understand it more in-depth?

12 MR. BENNETT: Well, he doesn't.

13 THE COURT: He doesn't?

14 MR. BENNETT: He does not suggest that he knows
15 anything about whether Mr. Martorello actually benefited
16 from using this --

17 THE COURT: That's the third opinion -- is that
18 right? -- what we're talking about now?

19 MR. BENNETT: We are.

20 THE COURT: Okay.

21 MR. BENNETT: Also, there's no evidence -- and
22 Mr. Norman doesn't include any in his report and
23 testified, because he never saw the documents, that
24 Mr. Martorello actually used this particular IRS
25 structure. So what you have --

1 THE COURT: Wait a minute. I lost you on that.
2 What do you mean?

3 MR. BENNETT: So all Mr. Norman did was look at
4 sale documents. The deferred compensation sale method
5 that he's describing is an IRS tool to get a certain tax
6 benefit. And he cites that at footnote 87 of his report.

7 THE COURT: Does he say that this sale document
8 fits that IRS regulation?

9 MR. BENNETT: What he says is that it could
10 have. This type of structure -- Mr. Martorello could have
11 benefited if he, tax wise, treated it and reported it that
12 way to the IRS. There's no evidence that Mr. Martorello
13 did.

14 And, in fact, he testified -- and you see that
15 part of the deposition. He testified, I've never seen
16 Mr. Martorello's taxes. So when you see his "see report"
17 where he says it provides tax benefits to Martorello, it's
18 coming from a witness who testified they never gave me his
19 report, his taxes. He's never seen them. He doesn't even
20 know that Mr. Martorello used this tax structure. He's
21 saying, You could have. But that's clearly irrelevant.

22 THE COURT: All right. Anything else?

23 MR. BENNETT: No, sir.

24 THE COURT: All right. Okay. He says it's
25 neither relevant, that other companies have done it this

1 way, and that 403 takes it out of play even if it's
2 marginally relevant, as to opinion 1 and 2, and that
3 opinion 3, there's no basis for it at all.

4 Is that a fair statement of where you are?

5 MR. BENNETT: It is, Your Honor.

6 THE COURT: So what do you say, sir?

7 MR. TALIAFERRO: So if I could take those in
8 reverse order.

9 THE COURT: Whatever way you want to take them.

10 MR. TALIAFERRO: The tax benefit, Your Honor, at
11 page 22 of the report is about the timing of the sale as
12 it relates to Mr. Martorello's move from Puerto Rico to
13 the United States.

14 THE COURT: Well, I understand. But he says, in
15 that respect, on the top of 23, "I understand that
16 Mr. Martorello was eligible for this exemption as a
17 resident of Puerto Rico. As such, by selling Bellicose
18 Capital prior to his contemplated move from Puerto Rico,
19 the gains on the sale of Bellicose Capital were tax
20 exempt. On the other hand, if the sale took place after
21 Mr. Martorello's contemplated move, the sale would have
22 been subject to the United States federal capital gains
23 tax, likely at a rate of 20 percent."

24 Likely.

25 Let's see. "Additionally, had Mr. Martorello

1 retained his interest in Bellicose Capital, his income
2 from that investment would have been subject to U.S.
3 income taxes at ordinarily individual rates. As such,
4 Mr. Martorello had a tax incentive to sell Bellicose
5 Capital."

6 MR. TALIAFERRO: That's correct.

7 THE COURT: So --

8 MR. TALIAFERRO: And Mr. -- we don't dispute
9 that Mr. Norman did not look at Mr. Martorello's tax
10 returns.

11 THE COURT: How can he make any comment on the
12 tax consequences of it if he didn't look at his tax
13 returns?

14 MR. TALIAFERRO: He's explaining that that was a
15 benefit that would have been eligible based on the timing
16 of the sale. If they --

17 THE COURT: Depending upon what? I mean, don't
18 you have to look at the tax returns to make an opinion on
19 the availability of a tax -- or not the tax returns, the
20 tax records so that you can make an intelligent opinion on
21 the benefit or not of the tax -- of the sale as it affects
22 taxes?

23 MR. TALIAFERRO: Well, we submit that the sale
24 of the business and whether the tax benefit would have
25 been available is an objective, appropriate subject for

1 expert testimony.

2 Whether it was taken advantage of --

3 THE COURT: Is there testimony from Martorello
4 that he received advice on taxes before he made the sale?
5 Is there any testimony of that?

6 Not whether or not some expert, after the fact,
7 said it might have been available, but is there any
8 testimony that he took taxes into account in the date of
9 the sale at all?

10 MR. TALIAFERRO: He did -- well, I hate to bring
11 this up. He did bring that up and testified to that at
12 the misrepresentation opinion. I don't believe that --
13 well, I don't believe that that was -- I don't believe
14 that that specific testimony was challenged in the
15 misrepresentation opinion.

16 THE COURT: I don't know whether it was or
17 wasn't. You got it?

18 MR. GUZZO: Your Honor, we disagree with that.

19 THE COURT: Okay. I'll give you a chance.

20 MR. GUZZO: Okay.

21 THE COURT: In other words, wouldn't Martorello
22 have to testify to that before this opinion would come in?

23 MR. TALIAFERRO: That may be necessary. And we
24 can lay that foundation if that's necessary to do, but we
25 think that he can lay that testimony -- lay that

1 foundation.

2 THE COURT: Has anybody got his testimony on
3 that previously? Did he testify to it in deposition? Did
4 he testify to it in interrogatories? Anything -- anything
5 in the record where Martorello says he timed the matter
6 for tax sale. Apart -- forget what Norman said. I'm
7 interested if there's a factual predicate for it.

8 MR. TALIAFERRO: In addition to his testimony,
9 Your Honor, there's also the text messages, which are
10 attached to plaintiffs' motion to exclude. In that
11 testimony, he's celebrating the tax treatment of the loan.

12 Now, plaintiffs, to be fair, characterized that
13 as he was expressing that he wasn't sure about the tax
14 treatment. We think that that --

15 THE COURT: What does it say?

16 MR. TALIAFERRO: So I actually -- the testimony
17 in the July 2020 hearing is Document 1200-1. It's
18 Exhibit A to our opposition.

19 THE COURT: All right. I've got it. What does
20 it say?

21 MR. TALIAFERRO: On page 226 --

22 THE COURT: 225.

23 MR. TALIAFERRO: Yeah. The next --

24 THE COURT: "What motivated -- at the point in
25 time you agreed to sell Big Picture and SourcePoint, what

1 were the motivations for that sale?"

2 Answer, "It was the attractive offer that I
3 received from the tribe's council and the tribe."

4 It doesn't say anything about taxes.

5 MR. TALIAFERRO: And then if you look at the
6 next page --

7 THE COURT: So where does it say about taxes?

8 MR. TALIAFERRO: If you look at the next page,
9 page 226-16, "I had studied the -- if it would work from a
10 tax perspective."

11 THE COURT: Hold on. Wait just a minute. 227?

12 MR. TALIAFERRO: No. 226, beginning at line 16.

13 THE COURT: Line 16. Excuse me. "I had studied
14 the -- if it would work from a tax perspective for me. At
15 one point I found out that it wouldn't, and I wasn't going
16 to refuse to sell. That was October 2014, and then
17 eventually I concluded that the sale would have to close
18 January 1st, 2016, because then that would allow me and my
19 family to move back to the mainland to raise our first
20 kid."

21 "And why was that a factor in your decision to
22 sell at the time you sold?"

23 "Because if we sold in 2015, I would have had to
24 have stayed on the island until 2016. But in 2016, we
25 could move back, and we were having -- our child was born,

1 you know, August 15th. So we were around first trimester,
2 January, February 2015. So by that time, I knew it was
3 less likely my wife would want to be away from family."

4 Is that what you're talking about?

5 MR. TALIAFERRO: Yes, Your Honor.

6 THE COURT: What part of that has to do with
7 taxes?

8 MR. TALIAFERRO: He says it would work for me
9 from a tax perspective.

10 THE COURT: Well, he said, "I studied that." He
11 doesn't say whether it would or wouldn't.

12 MR. TALIAFERRO: That's correct, Your Honor. He
13 does not say whether it would or wouldn't.

14 THE COURT: All right.

15 MR. TALIAFERRO: The second piece of evidence,
16 and I think --

17 THE COURT: Do we know -- is there anything in
18 the record about how he studied it or anything?

19 MR. TALIAFERRO: I'm not aware of anything
20 beyond that testimony, Your Honor.

21 THE COURT: Okay. All right.

22 All right. Are you standing for exercise or
23 what?

24 MR. TALIAFERRO: No.

25 THE COURT: No. Mr. Bennett.

1 MR. BENNETT: If we wanted to complete the
2 record, we have two other parts of the record that
3 expressly discuss that exact issue before you moved on.

4 MR. TALIAFERRO: Well, I was going to --

5 THE COURT: Let him finish, and then you'll have
6 a chance.

7 MR. BENNETT: I mean Mr. Martorello's actual
8 words.

9 THE COURT: That's fine. You can raise that
10 when it's your turn.

11 MR. BENNETT: Yes, sir.

12 THE COURT: When you get called on in class, you
13 raise your hand. And when you get called on in court,
14 it's your turn.

15 All right. Mr. Taliaferro, what else?

16 MR. TALIAFERRO: Then -- and I think what
17 Mr. Bennett was about to bring to the Court's attention --
18 and he obviously can characterize these text messages how
19 he wants, but if you look at 1182-3, which are the text
20 messages that --

21 THE COURT: I don't happen to have that right up
22 there with me. Have you got a copy of it?

23 MR. BENNETT: We can lend our copy. Here.

24 THE COURT: May I have it? Sorry I don't have
25 everything in this case --

1 MR. BENNETT: It's small for my eyes, Judge,
2 but --

3 THE COURT: Thank you. And this is 11 -- what
4 did you say? 1182-3. So what part of it do you want me
5 to read?

6 MR. TALIAFERRO: If you'd look at the second
7 page.

8 MR. BENNETT: I'm sorry.

9 THE COURT: I only got one page. Mr. Bennett.

10 MR. BENNETT: I didn't give him the first.

11 THE COURT: Don't be so parsimonious.

12 Thank you very much.

13 All right. Second page of 1182-3. It's called
14 page 3 of 3 on this ECF system. So where on there do you
15 want me to look?

16 MR. TALIAFERRO: If you look down at the fifth
17 text message --

18 THE COURT: "I suspect the NPV" --

19 MR. TALIAFERRO: That's the net present value of
20 the note.

21 THE COURT: -- "was 100 million. So the first
22 100 million received is taxed in 2016 based on 2016
23 residency."

24 MR. TALIAFERRO: And that's a reference to
25 Mr. Martorello's residency as of 2016, which was

1 Puerto Rico.

2 THE COURT: All right.

3 MR. TALIAFERRO: Plaintiffs remain free to
4 dispute, as I expect they will, that taxes were the real
5 reason for the sale.

6 Mr. Norman's testimony establishes that, as that
7 tax message shows, that there was a tax benefit to be
8 derived from --

9 THE COURT: That's not relevant unless it was
10 shown that Mr. Martorello was told there was a tax
11 benefit. Are you representing to me that he's going to
12 testify about the tax benefit that Norman relates in here
13 on that IRS section?

14 MR. TALIAFERRO: I believe he will testify.

15 THE COURT: If he does, I think I have to abide
16 the event and look at the testimony on the tax aspect of
17 it and that's the reason for the sale.

18 I will hold the ruling on that and you have to
19 lay a foundation is the ruling on that motion -- that
20 aspect of the opinion.

21 MR. TALIAFERRO: Okay. So then on the first
22 two --

23 THE COURT: Yeah. He basically says they are
24 not relevant and they fall on the wrong side of the 403
25 analysis and that Judge Orrick held that in the *Brice*

1 case, and I believe he did. That is to say that other
2 companies have done it this way. So he's saying so what.

3 MR. TALIAFERRO: And I'm not familiar with the
4 *Brice* case, but I -- I don't know if that testimony about
5 the way other businesses do it was in relation to a sale
6 of the business specifically. So I can't speak to
7 whether -- the testimony --

8 THE COURT: Where is that part of the *Brice*
9 case? I'm afraid I left my *Brice* back in the office.
10 Where is the transcript on that -- I mean the decision on
11 that? Let me see it. I have a recollection that it's
12 similar to the Norman issue, but I can't now say for sure
13 that that's correct. Have you got a copy?

14 MR. BENNETT: Yes, sir.

15 Your Honor, the --

16 THE COURT: What page are you talking about so
17 you can refer him and me to it?

18 MR. BENNETT: Yes, sir. Page 14 is the start of
19 the full discussion of the motions to exclude. Page 15 --

20 THE COURT: Wait a minute. Wait a minute. My
21 pages don't have 14, 15 on them.

22 My pagination goes from page to page. Oh, I
23 see. The number you're talking about is in the margin.

24 MR. BENNETT: Yes, sir.

25 THE COURT: All right. So where would that be

1 in -- on -- what heading is that in?

2 MR. BENNETT: It's under III, Plaintiffs' Motion
3 to Exclude --

4 THE COURT: Okay. Hold on.

5 MR. BENNETT: Here it's talking about the
6 analogy to outsourcing.

7 THE COURT: Page 18, you say?

8 MR. BENNETT: Page 14 is the start of it.

9 THE COURT: Fourteen. Okay. Hold on.

10 All right. That's -- under number III, section
11 1962(a), and then where does it go?

12 MR. BENNETT: Well, said in the first argument
13 is that first paragraph under III in 14.

14 THE COURT: Starting with what?

15 MR. BENNETT: And others and how the outsourcing
16 companies --

17 THE COURT: What's the start of the paragraph?
18 That is how I can find it.

19 MR. BENNETT: I'm sorry. If you go to page 15,
20 the start of the paragraph is the second full paragraph on
21 the left. It says --

22 THE COURT: What's the word say?

23 MR. BENNETT: "Plaintiffs' motions."

24 THE COURT: On page 15, the top of the page say
25 Homes of Arizona, Inc., if you're using the --

1 MR. BENNETT: Let my try it differently. Let me
2 give you my 15.

3 THE COURT: Just tell me where it is and where
4 it starts.

5 MR. BENNETT: Well, I'm wondering if you have a
6 different printout.

7 THE COURT: Well, you gave it to me.

8 MR. BENNETT: I did.

9 THE COURT: So whatever it is, I don't know.

10 MR. BENNETT: The bottom right --

11 THE COURT: You're not -- you're not on --
12 you're on page 26.

13 MR. GUZZO: It's on page 14.

14 MR. BENNETT: I'm sorry. It's Westlaw page 14,
15 the bottom right-hand corner.

16 MR. GUZZO: Your Honor, it's in the second
17 paragraph.

18 THE COURT: It's the Westlaw -- it's the Westlaw
19 page. Give it back to him. Thank you.

20 It would be nice if you tell me which one of
21 these pages you're talking about. There's the
22 interlineated numbers that are between pages that are
23 actual reporter page. Then there's the internal number,
24 and then there's the Westlaw number.

25 MR. BENNETT: Yes, sir.

1 THE COURT: So "plaintiffs' motions to exclude
2 are granted." Okay. "Both of these experts opine on
3 issues that are not directly relevant to the resolution of
4 the claims against the defendants remaining in these
5 consolidated cases. Whether the structure of the
6 arrangements between the tribes and some of the defendants
7 are similar to other prior or subsequent arrangement is
8 not relevant to the potential RICO liability or liability
9 under California law. Similarly, how the tribe spent the
10 money" -- no, that's not that.

11 "And the social utility of that income is
12 similarly irrelevant, except to the scope of the financial
13 benefit vis-a-vis non-tribal entities. However, that
14 issue can be established through documentary and
15 percipient witness testimony."

16 Okay. So basically, he held there that how
17 other companies did it, arranged their transactions is not
18 relevant to any RICO liability.

19 Did that case involve RICO liability under
20 1962(c) and (d)?

21 MR. BENNETT: Yes, Your Honor.

22 THE COURT: All right. Do you have it?

23 MR. TALIAFERRO: Yes, Your Honor.

24 THE COURT: He's ruled that way. What do you
25 think about that?

1 MR. TALIAFERRO: So this case does not appear to
2 have involved a sale of the business and an exit by any of
3 the principals. I'm pretty sure Mr. Morgan --

4 THE COURT: Well, that's not the issue.

5 The issue is if they are saying that this is an
6 unusual or sham transaction, evidence that it is a usual
7 mechanism would be available to show that it is not.

8 MR. TALIAFERRO: That's correct, Your Honor.

9 THE COURT: Now, that has marginal relevance.
10 So the question then becomes how do you assess the
11 reliance? He's raised the question, under 403, that
12 that's such a sideshow that it would confuse the jury.

13 Is that where you are?

14 MR. BENNETT: Yes, Your Honor.

15 THE COURT: All right. So answer that one.

16 MR. TALIAFERRO: Okay. We don't think it's a
17 sideshow.

18 THE COURT: Because?

19 MR. TALIAFERRO: Because if there's no expert
20 testimony to explain the normalcy and the regular nature
21 of seller-side financing and of seller covenants -- now
22 Mr. Bennett characterized those as continued control.
23 Mr. Norman --

24 THE COURT: Well, they're characterizable in
25 most transactions as continued control. Isn't that the

1 way they do it?

2 MR. TALIAFERRO: We think those are fairly
3 characterized as sellers wanting to maintain the quality
4 of the business.

5 THE COURT: Of course, and they keep some pretty
6 tight control over it so it will be done right.

7 MR. TALIAFERRO: That's correct.

8 THE COURT: At one point in time, it gave rise
9 to a claim called lender liability, if you were -- if you
10 were financing a business or if you were a bank. And
11 there was the whole issue of what was the purpose of all
12 of these various and sundry mechanisms. So I think I
13 understand your point on it.

14 MR. TALIAFERRO: And so that -- those
15 restrictions, those covenants need to be placed in the
16 context of their normal business practice and whether --

17 THE COURT: Not of a normal business practice
18 but of a not unusual business practice.

19 MR. TALIAFERRO: The not unusual business
20 practice. That's correct, Your Honor.

21 THE COURT: Yeah. I mean, that's what he says.
22 It's not unusual.

23 All right. Mr. Bennett, anything else?

24 MR. BENNETT: Just two things.

25 THE COURT: This case is different than the

1 Brice case in the respect, as Mr. Taliaferro said, it
2 seems to me. So why can't they put on -- if you say this
3 is a sham, an artifice, why can't they put on evidence
4 that this is a standard way of doing business and then you
5 can cross-examine on the effect of it and you get -- of
6 course, you get some good out of what he was just talking
7 about, about the controls, and that's the consequence they
8 have to bear if they put him on. I don't know whether
9 they will or not, as you said. But if they do, I don't --
10 it doesn't seem to me to be out of line when you're
11 contending that this is an artifice that they say
12 evidence -- they present evidence that it's not.

13 MR. BENNETT: We're not saying it's an artifice.

14 THE COURT: You are. You are saying it's an
15 artifice by which he maintained control, a device.

16 MR. BENNETT: We are saying -- it was a device
17 by which he was able to sell the company into somebody
18 else's name but get all the benefits of ownership.

19 THE COURT: Well, you're right. That's a
20 device.

21 MR. BENNETT: And there's nothing that this
22 witness says that rebuts that single point. This would
23 be --

24 THE COURT: He doesn't have to. The question is
25 whether or not the testimony they are offering actually is

1 probative of a way to meet your contention. Then they may
2 have to offer other evidence from Martorello and other
3 people about why they did it, but that doesn't keep this
4 guy from testifying, I don't think.

5 MR. BENNETT: Judge, we could stipulate -- this
6 is the equivalent to have a witness that testified you can
7 create a corporation or you can create a limited liability
8 company. There's no probative value of that.

9 But if this witness wants to testify that this
10 is a -- I'm sorry.

11 In addition to that, even for the first two
12 opinions, A and B, this witness doesn't testify that
13 Mr. Martorello, in fact, did implement that -- did follow
14 that structure. They implemented the sale. It's an IRS
15 categorization. It's like --

16 THE COURT: You've got an expert to say that,
17 then, don't you?

18 MR. BENNETT: Well, this witness never
19 testified. All he did is testify there was this
20 possibility that a person who had this kind of sale could
21 have treated it like a deferred compensation,
22 seller-financed.

23 THE COURT: No. What you're saying is different
24 than his opinion. He says that the transaction is a
25 deferred compensation sale arrangement that is common in

1 middle-market, private business acquisitions. Why can't
2 he say that? And then it's up to you to say, well, here's
3 the problem you got.

4 MR. BENNETT: He can say that.

5 THE COURT: All right. Well, then don't object
6 to it.

7 MR. BENNETT: I don't object to it.

8 THE COURT: Then he can say the specific terms
9 the Bellicose transaction are common in deferred
10 compensation, seller-financed business transactions.
11 That's a different one.

12 First, he's saying the mode of sale is common.
13 The next one is the terms of sale.

14 Now, what does the record show about whether he
15 has ever compared the terms of sale in the Bellicose
16 transaction with any other business transaction?

17 MR. BENNETT: Judge, there's nothing in his
18 report that says that. He just simply declares it.

19 THE COURT: Is that right? Where does he say
20 it? Tell me where he says it. Is this the first one that
21 it appears in? Second one?

22 I want to know -- he can't testify to the
23 opinion number 2 unless he testifies he's actually made a
24 comparison. And where is it?

25 MR. TALIAFERRO: Your Honor, if you look at

1 page 17.

2 THE COURT: Seventeen. Hold on. Of the
3 original report, that's 1182-1?

4 MR. GIVEN: Yes, sir.

5 THE COURT: Seventeen. Let's see what he says.
6 All right. "The specific terms are common" -- that's his
7 opinion on that. He says, "I have seen no evidence that
8 the Bellicose transaction unreasonably favored
9 Mr. Martorello or provided Mr. Martorello with de facto
10 ownership."

11 Well, he can't testify to that. I mean, he's
12 not going to testify to that kind of stuff.

13 MR. TALIAFERRO: That's correct, Your Honor.

14 THE COURT: What is he? He just wants to come
15 in here and volunteer?

16 Where is it that he says --

17 MR. TALIAFERRO: The example he provides is in
18 the next part of that paragraph. "For example, I was
19 involved" --

20 THE COURT: -- "in a seller-financed transaction
21 that utilized the calculation for determining cash flow
22 for reinvestment of the business with any excess cash flow
23 used for a promissory note payment."

24 Well, that just says he compared it with one.
25 That is not the basis for saying "are common in deferred

1 compensation, seller-financed business transactions." You
2 can't use one as the basis for commonality in a whole
3 industry. He can't testify to that.

4 MR. TALIAFERRO: I understand, Your Honor.

5 THE COURT: That's the basis for it?

6 MR. TALIAFERRO: Additional examples were
7 solicited during his deposition that formed --

8 THE COURT: What's the rule on that?

9 You can't augment a report with a deposition
10 because the rules, as changed in 1993, require that you
11 put everything in the report so that the people will know
12 whether to cross-examine somebody and a cross-examination
13 can be confined to what's in the report. And to frustrate
14 the practice that grew up with experts trying to bail
15 themselves out of deficient reports by testifying at the
16 deposition to whole new things, thereby necessitating
17 another round of discovery and so forth.

18 In other words, whatever went on in the
19 deposition is antithetical to the requirement of stating
20 the full basis for the report that's in Rule 26.

21 So he can't testify to B. He can testify to A.
22 And he -- you keep him on a tight leash. He's not going
23 to be talking about all of these things that he seems like
24 he wants to talk about. But he can give the opinion in A.
25 He can give the opinion in C only if there is a basis for

1 it, and I will determine that.

2 MR. BENNETT: Your Honor, you said I could have
3 my turn on C.

4 THE COURT: What?

5 MR. BENNETT: On C, may I have my turn?

6 THE COURT: You've had your turn. You started
7 with your turn.

8 MR. BENNETT: Understood. And my reply, before
9 you rule on C, I wanted to read you from your
10 misrepresentation opinion, as well as --

11 THE COURT: All right. I think that's fair
12 game. That's fair to do. It's late in the afternoon, and
13 I may have precipitously sought to terminate the day. And
14 I apologize for my manifold sins and weaknesses.

15 MR. BENNETT: From the Court's memorandum
16 opinion in this case, the misrepresentation opinion -- and
17 I am reading -- I'm reading the Westlaw version online,
18 but it's asterisk 11, section asterisk 11. The Court
19 wrote, "The record is thus clear, beyond serious question,
20 that Martorello was motivated to sell Bellicose to LVD
21 because of the threats of litigation and enforcement
22 action against him and his entities under the then current
23 lending arrangement between him, his entities, and LVD.
24 Nonetheless, Martorello, at the evidentiary hearing,
25 testified that his motivations for the sale included,

1 quote, the attractive offer that (he) received from the
2 tribe's council and the tribe and his wish to raise his
3 child in mainland United States. The testimony is simply
4 not credible in view of the substantial records written at
5 the time by Martorello and the evidence presented at
6 evidentiary hearing, nor judged by his demeanor when
7 testifying on the point at the evidentiary hearing can the
8 Court accept Martorello's testimony as credible."

9 THE COURT: Did the Fourth Circuit review that
10 finding? Was it brought to the Fourth Circuit for
11 decision?

12 MR. BENNETT: It was.

13 THE COURT: What did the Fourth Circuit say
14 about it?

15 MR. BENNETT: The Fourth Circuit found that this
16 Court's conclusion -- and I apologize. I'm using the
17 Fourth Circuit's language. The Fourth Circuit concluded,
18 "This Court was right to find that Mr. Martorello had
19 lied," a word I wouldn't ordinarily use in this
20 courthouse.

21 Mr. Martorello's own words are at
22 Document 1182-2, filed, I believe, the summary judgment
23 briefing. 1182-2, page 2 of 3. Mr. Martorello's e-mail
24 to Nicole St. Germain, who was with the tribe, copying
25 Mr. Rosette, Ms. Wichtman, and Tanya Gibbs, lawyer for the

1 tribe. He wrote -- and this was a negotiation of the sale
2 that ultimately occurred. "Hi guys. Nicole and I spoke
3 at length on Friday about this. I likely have a massive
4 negative tax consequence associated with this. I'm trying
5 to figure, but I'm ready to proceed with the potential
6 sales of the companies/discussion. What are the next
7 steps?"

8 So there is no evidence -- of course,
9 Mr. Norman never saw Mr. Martorello's tax documents. He
10 never saw correspondence. He never spoke to
11 Mr. Martorello. It's completely irrelevant that
12 theoretically, if all the pieces were aligned, there could
13 have been a tax benefit to Mr. Martorello when we know
14 factually that the reason that he sold was because of
15 impending litigation and threats of prosecution.

16 THE COURT: All right. Thank you.

17 Anything else you wish to say? Mr. Taliaferro.

18 MR. TALIAFERRO: I think this is fairly well
19 plowed in the summary judgment briefing, Your Honor. But
20 the document that Mr. Bennett just read from on the
21 negative tax liability was from 2014. At the July 2020
22 hearing, Mr. Martorello testifies, "At one point it wasn't
23 going to work for me from a tax benefit and then I
24 determined that it was."

25 THE COURT: Right.

1 MR. TALIAFERRO: So that's the evolution of
2 that.

3 THE COURT: I understand. Okay.

4 I said in the opinion that was decided, the
5 so-called misrepresentation opinion, that I needed --
6 couldn't make any decision that would alter what it was
7 that it had happened in the case previously or on appeal,
8 but that it needed to be taken into account in all future
9 proceedings in this case.

10 The Fourth Circuit -- I found that
11 Mr. Martorello lied about the testimony on the motivation
12 for the sale. The Fourth Circuit affirmed it, and that's
13 the law that governs this. And it would be against the --
14 all principles of judicial administration to allow
15 Mr. Martorello or Mr. Norman to put in evidence that's
16 contrary to the finding that what he said about that topic
17 and the motivation for the sale was a lie, and the Fourth
18 Circuit affirmed it.

19 The opinion on C(3) will not be allowed for that
20 reason.

21 So -- and that's C. Excuse me. It's the third
22 opinion listed in ECF 1182-A, B, and C.

23 So the bottom line is that as to the opinions of
24 Norman, he may testify that the Bellicose transaction is a
25 deferred consideration sale arrangement that is common in

1 middle-market, private business acquisitions.

2 He may not testify that the specific terms of
3 the Bellicose transaction are common in any deferred
4 compensation, seller-financed business transactions for
5 lack of a basis, and he may not, for the reasons I just
6 stated, testify that the timing of the Bellicose
7 transaction provided additional tax benefit to
8 Mr. Martorello, nor may Mr. Martorello testify to that.
9 That's been settled. That's the rule here.

10 All right. So I was premature, wasn't I?

11 Are we finished with the motions now? Because
12 you've got the ones that you have to do -- you have to
13 work on. How -- but the two that I can deal with today of
14 the plaintiffs' motion respecting experts have been done.

15 Then there is what you do with Brandon, Beales,
16 Zywicki. And then there's the rebuttal expert report of
17 Zywicki that just came in, and I need to deal with that.
18 So you all are going to work that out.

19 MR. BENNETT: Yes, Your Honor.

20 THE COURT: All right. When are we going to
21 have -- when am I going to know what these experts are
22 proposed to testify to in view of the rulings that I have
23 made?

24 What I really would like is their report
25 highlighted to reflect the opinions they are going to

1 give, in view of the rulings that I have made.

2 MR. TALIAFERRO: I believe we had settled on
3 noon on Monday, Your Honor.

4 MR. BENNETT: I expect we're going to exchange
5 with one another noon on Monday.

6 MR. TALIAFERRO: Okay.

7 MR. BENNETT: And then we will need two days
8 together.

9 THE COURT: To file it.

10 MR. BENNETT: To get together, to determine if
11 there's any stipulations or agreement and to advise the
12 Court what remains in contest or not.

13 THE COURT: So you will file that on what date?

14 MR. BENNETT: If we could file it by close of
15 business Wednesday. Is that viable?

16 MR. TALIAFERRO: That's viable.

17 THE COURT: All right. File that by 5:00 on --
18 that's what day of the week is that?

19 MR. BENNETT: That would be Wednesday the 14th.

20 THE COURT: All right. So have I set a date for
21 the hearing of the motion for summary judgment of the
22 defendant yet?

23 MR. TALIAFERRO: We believe it's on the 20th,
24 but it's in the afternoon, Your Honor.

25 THE COURT: Yeah. And let me look and see.

1 MR. TALIAFERRO: 1:30.

2 THE COURT: Yes, it is. Is that a problem? If
3 it goes over, if it needs to go over, I can hear it in the
4 afternoon of the 21st as well.

5 MR. TALIAFERRO: It's not a problem for us, and
6 I -- we've discussed with plaintiffs' counsel.
7 Your Honor's ruling on the choice of law significantly
8 limits what we're moving for on summary judgment.

9 THE COURT: Okay. Will you do me a favor and
10 identify what remains for me to look at? I've got to go
11 back -- I've looked at that information, but I haven't
12 studied it carefully. So will you give me a list of the
13 parts of it that I need to focus on? You can just do it
14 by your headings. That will be sufficient.

15 MR. TALIAFERRO: We will file that notice,
16 Your Honor.

17 MR. GUZZO: I could tell you right now,
18 Your Honor, if you'd like. I filed the opposition last
19 night after the hearing so I'm pretty familiar with it.

20 MR. GIVEN: Can we --

21 THE COURT: I would like to say this. I think
22 you're probably going to end up agreeing on it, but I do
23 think since it's their motion and their ox is getting
24 gored, it's probably best, in the overall scheme of
25 things, that they be allowed to say how they feel like

1 it's done. If you don't agree with it, we can deal with
2 it later.

3 All right. So that will be good.

4 So does that take care of everything that's
5 pending in the way of --

6 MR. GIVEN: Yes, Your Honor.

7 THE COURT: Except the motion for summary
8 judgment and the things you've got to -- defendant's
9 motion for summary judgment. What else is left?

10 MS. KELLY: Just super briefly. The parties
11 have been working together because of the Court's ruling
12 on the motions in limines to -- we're going to be filing a
13 joint motion to extend certain deadlines in the pretrial
14 order so that --

15 THE COURT: Yeah, you need time to digest.

16 MS. KELLY: Yes. And so the parties will make
17 sure to have everything in that is filed with the Court in
18 sufficient time before the final pretrial conference.

19 THE COURT: All right.

20 MS. KELLY: But we are going to be filing a
21 motion to move the deadlines to work with our schedule.

22 THE COURT: I think that's fine. It's something
23 that happens anytime this approach works.

24 So just make sure it's in an order so there's no
25 misunderstanding about it.

1 MS. KELLY: Yes. And then --

2 THE COURT: I know you all will act
3 professionally and get it done, but just so there isn't
4 any problems, if you do that.

5 MS. KELLY: The one other thing. In order to
6 accommodate the schedule, in the *Galloway* against
7 Mr. Martorello, there's depositions that are scheduled of
8 the plaintiffs, and so we were going to also push those
9 back slightly. Just so Your Honor is aware.

10 THE COURT: That's fine.

11 MS. KELLY: It won't affect any filings or
12 anything with the Court.

13 THE COURT: That's fine by me.

14 MS. KELLY: Okay. Thank you very much, Judge.

15 THE COURT: All right. The other thing we're
16 really going to have to sort out is once we get all these
17 rulings in and where you stand on your summary judgment
18 and where you -- what's going on, we need to figure out
19 how the trial is going to get configured and what we're
20 really going to be doing. And right now, that's -- as I
21 said, we usually take that up on July the 26th at the
22 pretrial.

23 MR. GIVEN: Mr. Bennett and I spoke at lunch,
24 and we're going to work on that to facilitate and
25 streamline the pretrial conference in advance of the

1 conference.

2 THE COURT: I understand. Yeah. And then --
3 that will be fine. So thank you all very much for
4 everything. And you all have gotten me in trouble at home
5 because of the hour it is. Probably the Court staff is
6 the same situation so I'm going to flee.

7 We'll have adjournment.

8 (The proceeding concluded at 5:42 p.m.)

9 REPORTER'S CERTIFICATE

10 I, Tracy J. Stroh, OCR, RPR, Notary Public in and for
11 the Commonwealth of Virginia at large, and whose
12 commission expires September 30, 2023, Notary Registration
13 Number 7108255, do hereby certify that the pages contained
14 herein accurately reflect the stenographic notes taken by
15 me, to the best of my ability, in the above-styled action.

16 Given under my hand this 11th day of June 2023.

17 /s/

18

Tracy J. Stroh, RPR

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

LULA WILLIAMS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Case No. 3:17-cv-00461 (REP)
v.)	
)	
BIG PICTURE LOANS, LLC, <i>et al.</i> ,)	
)	
Defendants.)	
)	

**DEFENDANT MATT MARTORELLO’S RESPONSE TO PLAINTIFFS’ NOTICE AND
REQUEST FOR RECONSIDERATION OF COURT’S RULING ON SATISFACTION
OF THE 1962(d) ELEMENTS**

Defendant Matt Martorello, by and through his undersigned counsel, responds to Plaintiffs’ Notice and Request for Reconsideration of the Court’s Ruling on Satisfaction of the of the § 1962(d) claim elements. Dkt No. 1340.

In this Circuit, a violation of § 1962(d) “does not require that a defendant have a role in directing an enterprise,” *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012), and “simply agreeing to advance a RICO undertaking is sufficient” for a § 1962(d) violation. *Id.* As a result, Martorello’s Opposition to Plaintiffs’ Summary Judgment Brief, Dkt No. 1206, did not contest Plaintiffs’ assertion that “Martorello had high-level involvement in the facilitation of the” enterprise. Dkt No. 1241 at p. 28. Given the Court’s rulings that the loans are governed by the “law of the Commonwealth of Virginia,” Dkt. No. 1328, and that a good-faith defense is not available as a defense to liability under 18 U.S.C. § 1962(d), *id.*, Defendant concedes there are no remaining triable issues of fact on Plaintiffs’ § 1962(d) claim.¹

¹ Defendant disagrees with the choice of law and good-faith defense rulings and reserves all rights to appeal them but acknowledges that the Court has ruled on these two matters.

Dated: June 23, 2023

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)
LOEB & LOEB LLP
901 New York Ave., NW
Suite 300-E
Washington, DC 20001
Tel. (202) 618-5015
Facsimile: (202) 318-0691
jtaliaferro@loeb.com

Bernard R. Given (*pro hac vice*)
LOEB & LOEB LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, CA 90067
Telephone: (310) 282-2348
Facsimile: (310) 742-0414
bgiven@loeb.com

Counsel for Defendant Matt Martorello

CERTIFICATE OF SERVICE

I certify that on this 23rd day of June, 2023, a true and correct copy of the foregoing was served upon all parties that are registered to receive electronic service through the Court's ECF notice system in the above case.

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LULA WILLIAMS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Case No. 3:17-cv-00461 (REP)
v.)	
)	
BIG PICTURE LOANS, LLC, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANT MATT MARTORELLO'S STIPULATION REGARDING REMAINING
ELEMENTS OF RICO 1962(c) CLAIM**

Defendant Matt Martorello, by and through his undersigned counsel, hereby files the following stipulation regarding Plaintiffs' Claim under 18 U.S.C. §1962(c):

Given the Court's June 27, 2023 ruling that control is not a prerequisite for purposes of § 1962(c) liability, (*see, e.g.*, June 27 Transcript at 177:1-5; 180:9-12), **Mr. Martorello stipulates that, for the entire class period, he was associated with an association-in-fact enterprise the activities of which affect, interstate or foreign commerce, and Mr. Martorello participated in the operation of the affairs of the enterprise through the collection of unlawful debt.**

As a result, there are no remaining triable issues of material fact regarding Plaintiffs' § 1962(c) claim, and the Court can enter summary judgment on Plaintiffs' § 1962(c) claim.¹

Dated: June 30, 2023

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)
LOEB & LOEB LLP
901 New York Ave., NW
Suite 300-E
Washington, DC 20001
Tel. (202) 618-5015
Facsimile: (202) 318-0691
jtaliaferro@loeb.com

¹ Defendant reserves the right to appeal the Court's legal rulings made with respect to § 1962.

Bernard R. Given (*pro hac vice*)
LOEB & LOEB LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, CA 90067
Telephone: (310) 282-2348
Facsimile: (310) 742-0414
bgiven@loeb.com

Counsel for Defendant Matt Martorello

AGREED TO:

Dated: June 30, 2023

/s/ Kristi Cahoon Kelly
Kristi Cahoon Kelly (VSB #72791)
Andrew Joseph Guzzo (VSB #82170)
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030
Phone: 703-424-7572
Fax: 703-591-0167
Email: kkelly@kellyguzzo.com
Email: aguzzo@kellyguzzo.com

Leonard Anthony Bennett
Consumer Litigation Associates
763 J Clyde Morris Boulevard, Suite 1A
Newport News, VA 23601
Telephone: 757-930-3660
Facsimile: 757-930-3662
Email: lenbennett@clalegal.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 30th day of June, 2023, a true and correct copy of the foregoing was served upon all parties that are registered to receive electronic service through the Court's ECF notice system in the above case.

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LULA WILLIAMS ET AL.,
Plaintiffs.

v.

Case No. 3:17-cv-461


BIG PICTURE LOANS, LLC ET AL.,
Defendants.

ORDER

Having reviewed DEFENDANT MATT MARTORELLO'S STIPULATION REGARDING REMAINING ELEMENTS OF RICO 1962(c) CLAIM (ECF No. 1359), it is hereby ORDERED that summary judgment is entered in favor of the Plaintiffs as to Plaintiffs' COUNT TWO. CLASS ACTION COMPLAINT at 20 (ECF No. 1). Judgment thereon shall be entered at the conclusion of the trial set to begin on July 17, 2023.

By July 21, 2023, the parties shall advise: (1) the calculations of damages; and (2) whether the damages as to COUNT TWO are the same as, or different than, those for COUNT THREE.

It is SO ORDERED.

/s/ 
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: July 7, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

LULA WILLIAMS, et al.,

Plaintiffs,

v.

Case No. 3:17cv461

BIG PICTURE LOANS, LLC,
et al.,

Defendants.

AMENDED MEMORANDUM OPINION

This matter is before the Court on the PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ("Plaintiffs' Motion") (ECF No. 1165). By ORDER entered on June 16, 2023 (ECF No. 1328), Plaintiffs' Motion was granted in part. This MEMORANDUM OPINION further explains the reasons for so doing.¹

BACKGROUND

A. Factual Background

This class action proceeding concerns a "lending scheme allegedly designed to circumvent state usury laws." Williams v. Martorello, 59 F.4th 68, 72 (4th Cir. 2023) [hereinafter Williams

¹ It also explains subsequent orders that were based on the resolution of the Plaintiffs' Motion.

II). Plaintiffs, representing a class of borrowers,² allege that the defendant, Matt Martorello ("Martorello"), conspired with the Lac Vieux Desert Band of Chippewa Indians ("the Tribe") and various other entities and individuals to issue high-interest loans through the internet to consumers within the Commonwealth of Virginia. Plaintiffs brought a five count CLASS ACTION COMPLAINT ("Compl.") (ECF No. 1) against Martorello. COUNT ONE seeks a

² The Court certified the following classes:

(a) **Big Picture RICO Class:** All Virginia consumers who entered into a loan agreement with Big Picture where a payment was made from June 22, 2013 to December 20, 2019.

(i) **Big Picture Usury Sub-class:** All Virginia consumers who paid any principal, interest, or fees on their loan with Big Picture from June 22, 2015 to December 20, 2019.

(ii) **Big Picture Unjust Enrichment Sub-class:** All Virginia consumers who paid any amount on their loan with Big Picture from June 22, 2014 to December 20, 2019.

(b) **Red Rock RICO Class:** All Virginia consumers who entered into a loan agreement with Red Rock where a payment was made from June 22, 2013 to December 20, 2019.

(i) **Red Rock Usury Sub-class:** All Virginia consumers who paid any principal, interest, or fees on their loan with Red Rock from June 22, 2015 to December 20, 2019.

(ii) **Red Rock Unjust Enrichment Sub-class:** All Virginia consumers who paid any amount on their loan with Red Rock from June 22, 2014 to December 20, 2019.

Class Certification Order (ECF No. 1111) which was affirmed by the United States Court of Appeals for the Fourth Circuit in Williams II.

Declaratory Judgment that "the choice of law and forum-selection provisions are void and unenforceable under Va. Code § 62-1541(A) and as a matter of Virginia's well-established public policy." Compl. at 194.³ COUNT TWO seeks relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), COUNT THREE seeks relief under RICO, 18 U.S.C. § 1962(d). COUNT FOUR is based on violations of Virginia Usury Laws. COUNT FIVE presents a claim for unjust enrichment under Virginia law. Compl. at 20-31.

The Plaintiffs Motion seeks summary judgment on COUNT THREE, the RICO conspiracy claim⁴ based on 18 U.S.C. § 1962(d) which provides that:

It shall be unlawful for any person to conspire to violate any of the provisions of subsection ... (c) of this section.

18 U.S.C. § 1962(d).

The Plaintiffs' Motion also seeks summary judgment on certain elements of COUNT TWO based on 18 U.S.C. § 1962(c): participation in the affairs of the RICO enterprise. Section 1962(c) provides that:

³ COUNT ONE will be dismissed pursuant to PLAINTIFFS' CONSENT MOTION TO DISMISS COUNT ONE OF THE COMPLAINT (ECF No. 1400).

⁴ PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ("Pls. Memo. in Supp.") at 3 n.1 (ECF No. 1169). An unsealed version is filed at ECF No. 1166.

It shall be unlawful for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

Section 1962(c) is also the RICO section that is charged as that which was violated by the conspiracy that is alleged in COUNT THREE. A brief summary of the factual underpinnings of Plaintiffs' RICO claims is necessary to an understanding of the issues that are the subject of this MEMORANDUM OPINION.

According to Plaintiffs and supported by the record offered in support of Plaintiffs' Motion, and not much materially disputed, Martorello began engaging in the online lending business in 2008. In 2011, Martorello, working with Robert Rosette, a well-known lawyer in the tribal lending business, established a relationship with the Tribe. The alleged purpose of this relationship was to establish a so-called "rent-a-tribe" online lending operation. The online lending operation was conducted by the alleged RICO enterprise, which was comprised of Martorello, several entities created and controlled by Martorello, several of his friends and relatives, the Tribe, and several entities created by the Tribe.

The purpose to be served by the relationship Martorello sought with the Tribe was to imbue a forthcoming online lending operation

with the Tribe's sovereign immunity. If that could be accomplished, Martorello envisioned that he {and entities that he would control and use to make high interest, usurious loans that violated the laws of most states and RICO) would be immune from civil and criminal liability for such violations.

There is undisputed evidence that, through the alleged RICO enterprise, the alleged RICO conspiracy made high interest loans.⁵ First, under the name of Red Rock Tribal Lending, LLC {"Red Rock"}, and then in the name of Big Picture Loans, LLC {"Big Picture Loans"}. Both of those entities are considered arms-of-the-tribe. Williams v. Big Picture, 929 F.3d 170 {4th Cir. 2019} [hereinafter Williams I].

However, the loans were funded by Martorello's company, Bellicose VI and then Bellicose Capital, LLC {"Bellicose Capital"}. The record shows that Bellicose VI and then SourcePoint VI, LLC {"SourcePoint"} {Bellicose VI's subsidiary}, which were owned and controlled by Martorello, handled the day-to-day operation of the business of the tribal entities and, for all practical purposes, underwrote, issued, and serviced the loans made online by the alleged RICO enterprise. For most of the time at issue, the Tribe received approximately 2% of the net revenue

⁵ I.e., loans that were unlawful under Virginia law and 18 U.S.C. § 1961(6).

from loan payments.⁶ Martorello's companies received the rest. And, ultimately, those companies sent the money to Martorello and his family through offshore trusts that Martorello established to receive the proceeds of the unlawful loans.

The undisputed evidence shows that Martorello was the founder and Chief Executive Officer of Bellicose Capital. There is no material dispute that Martorello created Bellicose VI and Bellicose for the purpose of funding, making, and collecting the alleged unlawful loans made by the alleged RICO enterprise.

Nor is it disputed that, in 2014 and 2015, Martorello knew about enforcement actions taken by various state agencies against unrelated, but similar, rent-a-tribe operations engaged in online lending operations such as the one being operated by Martorello's entities and the Tribe. So, in January 2016, Martorello arranged a restructuring of the online lending operation in which Martorello, his entities, and the Tribe were involved. As part of that restructuring, the Tribe acquired Bellicose Capital, and Martorello's entities and the Tribe entered into several related

⁶ Late in the timeframe, the Tribe's percentage was increased slightly, to 4%, following a restructuring of the enterprise that will be discussed below.

contracts that facilitated the continuation of their allegedly illegal online lending activities.⁷

After the restructuring, most of the proceeds from the online lending enterprise continued to flow to Martorello and his family through a series of companies and trusts. Throughout the entire course of the alleged RICO enterprise, its purpose was to make and collect unlawful debts {i.e., loans on which the interest rate exceeded the usury rate permitted under Virginia law and which met the definition of "unlawful debt" in 18 U.S.C. § 1961(6)}. There is substantial evidence to support that Martorello was extensively involved in the affairs of the alleged RICO enterprise.

It is important to keep in mind that the Tribe enjoyed sovereign immunity. Therefore, even if it made loans that exceeded permissible usury rates, it could not be sued. The same is true of entities organized by the Tribe to participate in the RICO enterprise's online lending scheme. See Williams I, 929 F.3d at 185. The record contains substantial, undisputed evidence, that Martorello's purpose in making online loans under the so-called "rent-a-tribe model" was to attempt to clothe the alleged RICO enterprise with the sovereign immunity which the Tribe and its entities possessed.

⁷ Under the restructured lending arrangements, the Tribe was to receive approximately 4% of the gross revenues.

There is evidence to show that Martorello (the alleged mastermind and principal beneficiary of the rent-a-tribe scheme), the entities that make and collect the usurious loans and that distribute the loan payments, and the people who run these various entities comprise the alleged RICO enterprise. The present action focuses on Martorello because he is said to have conceived of, and set up, the unlawful online lending arrangements, and spearheaded efforts to make them appear to be of tribal origin. But allegedly, in fact, it was his business entities and Martorello himself who were conducting the affairs of the alleged RICO criminal enterprise. And, it was Martorello and his family and investors who ultimately received the funds generated by the unlawful usurious loans.

B. Procedural Background

This case has a long procedural history. It has twice been to the United States Court of Appeals for the Fourth Circuit. On the first occasion, the Fourth Circuit considered the question of tribal sovereign immunity and dismissed the two tribal entity defendants, Big Picture Loans and Ascension Technologies, LLC ("Ascension"). Williams I, 929 F.3d at 185; see also Dismissal Order {ECF No. 668} (dismissing Big Picture Loans and Ascension). On the second, and more recent occasion, the Fourth Circuit affirmed this Court's class certification order. Williams II, 59

F.4th at 73. Thereafter, the parties conducted extensive discovery on the merits of the case after which the Plaintiffs and Martorello both filed motions for summary judgment.

1. **Martorello's Motion for Summary Judgment**

Martorello requested summary judgment that:

- (1) Tribal law applied to the loans;
- (2) Martorello could not be held liable under Virginia's usury laws; and
- (3) Martorello could not be held liable for unjust enrichment.^e

On June 26-27, 2023, the Court heard oral argument on Martorello's Motion for Summary Judgment (June 26, 2023 Minute Entry (ECF No. **1351**)). That motion was denied in its entirety. June 28, 2023 ORDER (the "June 28 ORDER#) (ECF No. 1354). On July 11, 2023, a MEMORANDUM OPINION (ECF No. 1392) was issued explaining that decision.

2. The Plaintiffs' Motion for Partial Summary Judgment

To some extent, the issues presented for decision in the Plaintiffs' Motion evolved over time because of the positions

⁸ **DEFENDANT MATT MARTORELLO MEMORANDUM OF LAW OF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT ("Martorello Memo. in Supp.n) at 18, 32, 35 (ECF No. 1255).**

asserted in the briefs⁹ and even in argument. Accordingly, it is necessary to explain the evolution of the issues from inception to decision.

The brief supporting the Plaintiffs' Motion originally specified that the only entire count presented for summary judgment was COUNT THREE, the RICO conspiracy claim under 18 U.S.C. § 1962(d) (Plaintiffs' Opening Memo, ECF No. 1169, p. 3 n.1). However, later in their brief, the Plaintiffs also presented Argument VI which was entitled: "Summary judgment should be granted that a violation of § 1962(c) [COUNT TWO] occurred."¹¹⁰ However, an examination of Plaintiffs' opening and reply briefs make it clear that Argument VI was addressed only to certain elements of COUNT TWO (the § 1962(c) claim); and that the Plaintiffs' Motion only sought summary judgment on those elements, not on COUNT TWO

⁹ PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1169); DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1218); and PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1244). At the request of Martorello, (ECF Nos. 1216 and 1217), a replacement memorandum (ECF No. 1218) was filed in an effort to remove from the decisional process the need to decide whether Martorello's original filing was objectionable for failure to satisfy the requirement of a local rule of civil procedure. The replacement memorandum was filed with the consent of the Plaintiffs, and it is intended to respond to the Plaintiffs' motion for partial summary judgment (the brief for which is ECF No. 1169).

¹⁰ (ECF No. 1169, pp. 36-40).

as a whole. With that clarification in mind, the Plaintiffs' Motion sought partial summary judgment:

- On the choice of law issue (ECF No. 1169, pp. 26-31);
- On the tribal immunity defense presented by Martorello {ECF No. 1169, pp. 31-32}; and
- That Martorello had violated § 1962(d) (ECF No. 1169, pp. 32-36) based on the assertions that: (A) Martorello knew about the alleged RICO scheme and (B) Martorello furthered the scheme and knowingly took millions of dollars therefrom; and
- On certain elements of COUNT TWO, to-wit:
 - (i) an enterprise existed; and
 - {ii} the loans made by the enterprise are unlawful debts; and
 - {iii} persons associated with the enterprise engaged in collection of those debts.¹¹

In response, Martorello substantively addressed some of those issues, stipulated as to some of them, and ignored others. It is thus necessary to sort out where Martorello now stands on those issues.

¹¹ Again, it is appropriate to keep in mind that at the time the Plaintiffs' Motion was filed, the Plaintiffs acknowledged the existence of a disputed issue of fact respecting whether Martorello participated in the management of the enterprise and therefore did not seek summary judgment on COUNT TWO, the alleged violation of 18 U.S.C. § 1962(c).

First, Martorello's response to the Plaintiffs' Motion took the position that Tribal law (not Virginia law) applied to the loans at issue because FEDERAL PREEMPTION PRECLUDES APPLICATION OF VIRGINIA LAW (ECF No. 1218, pp. 21-31). That argument is comprised of several subparts which are as follows:

- [The Tribe's] sovereignty rights require application of tribal law because of provisions in the so-called "Indian Commerce Clause;" and
- Application of Virginia law is at odds with the Native American Business Development Act ("NABDA") (ECF No. 1218, pp. 26-28); and
- The Economics of a Deal do not Change the Preemption Analysis; and
- The National Bank Act Preemption supports application of federal law; and
- The prospective waiver provisions in the choice of forum clause in the loan agreements do not render the tribal choice of law clause unenforceable; and
- Hengle v. Treppa is distinguishable and not controlling.

Second, Martorello opposed the requested partial summary judgment by claiming that he was entitled to present a mistake of law to the RICO claims and that therefore those claims were not amenable to summary judgment.

On June 7 and 8, 2023, the Court heard oral argument on Plaintiffs' Motion and the parties' respective motions in limine.¹² June 7, 2023 Trans. (ECF No. 1316); June 8, 2023 Trans. (ECF No. 1317). In his briefing and at oral argument, Martorello stipulated that:

- (1) if the Court determined that Virginia law applies, the loans constituted unlawful debts within the meaning of RICO (18 U.S.C. § 1961(6));
- (2) Martorello knew that there was an enterprise, as defined by 18 **U.S.C.** § 1961(4); and
- (3) "persons associated with the enterprise engaged in the collection of unlawful debt."

Hearing Trans. at 171-73. In addition, Martorello clarified that he no longer was claiming tribal immunity. Id. at 165.

Subsequently, the parties agreed that, based on the foregoing stipulations by Martorello and the Court's ruling on the choice of law issue, the only remaining questions as to the claim under 18 U.S.C. § 1962(d) (COUNT THREE) were whether Martorello could present a mistake of law defense (that tribal law applied) and, relatedly, whether the Plaintiffs had to prove that Martorello had to know that the loans were illegal. Id. In some iterations, the

¹² For a complete list of all matters heard during the June 7-8 hearings, see May 24, 2023 ORDER (ECF No. 1267).

latter contention was whether he had to know that the specific interest rate was illegal. At other times, the contention was merely a repetition of the belief that tribal law applied.

On June 16, 2023, the Court granted summary judgment in favor of the Plaintiffs as to:

- (1) The choice of law issue (1 I(1));
- (2) Tribal immunity issue (1 I(2));
- (3) Martorello's mistake of law defense (1 I(3));¹³ and
- (4) The following elements of the claim under 18 U.S.C. §§ 1962(c) (COUNT TWO):¹⁴

"(a) The loans in question are 'unlawful debts' as defined in 18 U.S.C. §§ 1961(6), 1962(c); and

(b) An 'enterprise' existed as defined in 18 U.S.C. §§ 1961(4), 1962(c); and

(c) Persons engaged in the enterprise collected unlawful debts; and

¹³ As explained below, MATT MARTORELLO'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT ("Martorello's Answer") (ECF No. 23) refers to the defense as one of "good faith," and the parties' briefs used the terms "good faith," "advice of counsel," and "mistake of law" interchangeably, but, at oral argument, both agreed that the defense actually was "mistake of law."

¹⁴ And, to the extent that § 1962(c) is alleged as part of the § 1962(d) RICO conspiracy claim, to that aspect of COUNT THREE.

(d) There is no willfulness element for a civil cause of action under 18 U.S.C. §§ 1962(c)-(d)."¹⁵

June 16, 2023 ORDER at 2-3 ("June 16 ORDER") (ECF No. 1328). This MEMORANDUM OPINION will further explain the reasoning on which those decisions were based.

After the June 16 ORDER was issued, Plaintiffs filed a request for reconsideration and asked the Court to amend the June 16 ORDER "to reflect that summary judgment is granted in favor of Plaintiffs as to 18 **U.S.C.** § 1962(d)'s elements that Martorello: (1) knew about; and (2) facilitated the usurious lending enterprise."¹⁶ Martorello conceded that, after the Court's ruling that the loans are governed by the law of Virginia and that a mistake of law defense is not available as a defense to liability, "there are no remaining triable issues of fact on Plaintiffs' § 1962(d) claim [COUNT THREE]."¹⁷ In perspective of that concession, the June 16 ORDER was amended to read: "Summary judgment is granted in favor

¹⁵ By ORDER (ECF No. 1397), this part of the ORDER (ECF No. 1328) was deleted.

¹⁶ PLAINTIFFS' NOTICE AND REQUEST FOR RECONSIDERATION OF COURT'S RULING ON SATISFACTION OF THE 1962(d) ELEMENTS at 2 (ECF No. 1340).

¹⁷ DEFENDANT MATT MARTORELLO'S RESPONSE TO PLAINTIFFS' NOTICE AND REQUEST FOR RECONSIDERATION OF COURT'S RULING ON SATISFACTION OF THE 1962(d) ELEMENTS (ECF No. 1345).

of the Plaintiffs as to all elements of Plaintiffs' 18 U.S.C. § 1962(d) claim [COUNT THREE]." June 26, 2023 ORDER (ECF No. 1350).¹⁸

Following the Court's June 26, 2023 oral ruling that "control is not a prerequisite for purposes of (18 U.S.C.] § 1962(c) liability," Martorello stipulated:

that, for the entire class period, he was associated with an association-in-fact enterprise the activities of which affect, interstate or foreign commerce, and Mr. Martorello participated in the operation of the affairs of the enterprise through the collection of "unlawful debt" ¹⁹

He also informed the Court that "there are no remaining triable issues of material fact regarding Plaintiffs' § 1962(c) claim [COUNT TWO]." Id. Thereafter, the Court granted summary judgment on COUNT TWO of the Complaint (the claim under 18 U.S.C. § 1962(c)). July 7, 2023 ORDER (ECF No. 1373).

Then, on July 10, 2023, for purposes of simplifying the forthcoming trial, Plaintiffs moved to dismiss the state law counts without prejudice, COUNTS FOUR and FIVE.²⁰ The Court granted that

¹⁸ The June 26, 2023 ORDER was later amended to correct a scrivener's error. July 5, 2023 ORDER (ECF No. 1362).

¹⁹ DEFENDANT MATT MARTORELLO'S STIPULATION REGARDING REMAINING ELEMENTS OF RICO 1962(c) CLAIM (ECF No. 1359).

²⁰ PLAINTIFFS' CONSENT MOTION TO DISMISS USURY AND UNJUST ENRICHMENT CLAIMS WITHOUT PREJUDICE PURSUANT TO RULE 41(a)(2) (ECF No. 1387).

motion, and dismissed COUNTS FOUR and FIVE without prejudice. July 10, 2023 ORDER (**ECF No.** 1390).

Also, on July 10, 2023, the parties stipulated "that the damages amount for the § 1962(c) claim [COUNT TWO] is \$43,401,817.47." JOINT NOTICE AND STIPULATION REGARDING § 1962(c) DAMAGES (ECF No. 1389). They then stipulated "that the damages for [the] § 1962(c) claim [COUNT TWO] are the same as the damages for the § 1962(d) claim [COUNT THREE]." (ECF No. 1389).

After conferring with the parties in a conference call, July 10, 2023 Call Trans. (ECF No. 1393), and "understanding that there are no remaining triable issues," the Court canceled the trial that had been set to begin with jury selection on July 12, 2023. (July 11, 2023 ORDER (ECF No. 1391)).

With the foregoing background in mind, we return to explaining the decisions on Plaintiffs' Motion.

DISCUSSION

A. Legal Framework

Rule 56 sets forth the familiar standard for summary judgment, providing that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Fed. R. Civ. P. 56(c). The Supreme Court has construed Rule 56(c) to "mandate the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court explained that, "[i]n such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Id.* at 323, 106 S. Ct. 2548; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In reviewing a motion for summary judgment, a court must view the facts and any inferences drawn from these facts in the light most favorable to the nonmoving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004). The nonmoving party must demonstrate that there are specific facts that would create a genuine issue for trial. See *Anderson*, 477 U.S. at 250, 106 S. Ct. 2505. "Where ... the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,

disposition by summary judgment is appropriate." United States v. Lee, 943 F.2d 366, 368 (4th Cir. 1991).

B. Analysis

This MEMORANDUM OPINION principally addresses two issues on which the Plaintiffs sought summary judgment: (1) the applicable law (the choice of law issue); and (2) the availability of a mistake of law defense to a claim for civil liability for conspiracy under RICO: 18 U.S.C. § 1962(d). It also resolves aspects of the Plaintiffs' Motion in Plaintiffs' favor because Martorello did not contest them.

1. Choice of Law: Tribal Law or Virginia Law

The parties dispute what law applies to the loans that were made by the alleged RICO enterprise. Plaintiffs argue that Virginia law governs because: (1) all Plaintiffs in this class resided in Virginia when they took out the loans and the effects of the loan were felt by Plaintiffs in Virginia and (2) the loan agreement's choice of law clause (which specifies tribal law as the governing law) is unenforceable. Pls. Memo. in Supp. at 27, 30.²¹ So, the

²¹ This dispute is also related to Plaintiffs' Motion in Limine 3, MEMORANDUM IN SUPPORT OF PLAINTIFFS' OMNIBUS MOTIONS IN LIMINE at 4 (ECF No. 1174) (requesting the Court to "Exclude Argument or Suggestion that Tribal Law Governs the Loans or Virginia law does not apply to the loans, or that the Class Action Waivers are Enforceable") (emphasis removed), and id. at 6 (requesting the Court to "Exclude Any Suggestion that Federal Policy Supports these Commercial Activities") (emphasis removed). Over Martorello's

Plaintiffs ask for summary judgment that Virginia law applies to the loan agreements.²²

In response, Martorello argues that various federal preemption principles preclude the application of Virginia law and, instead, that the loans at issue are governed by tribal law because of the Indian Commerce Clause, U.S. Const. Art. 1, § 8, and the federal preemption principles²³ said to derive from the NABDA and the National Bank Act ("NBA"). Martorello also argues that, even if the Indian Commerce Clause, the NABDA, and/or the NBA do not require the application of tribal law, the choice of law clauses in the loan agreement, specifying the application of tribal law, are enforceable under federal law.²⁴

(a) The Indian Commerce Clause, the **NABDA**, the NBA

Martorello argues that, instead of engaging in the usual choice of law analysis (which admittedly would not apply tribal

opposition, DEFENDANT MATT MARTORELLO' S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' OMNIBUS MOTION IN LIMINE at 2-3 (ECF No. 1205), the Court granted both these Motions in Limine. June 16, **2023 ORDER at 3 (ECF No. 1328)**.

²² Pls. Memo. in Supp. at 26.

²³ Martorello Memo. in Supp. at 18.

²⁴ **DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ("Martorello Response")** at 29 (ECF No. 1218).

law), the Court should engage in an Indian Commerce Clause analysis. Martorello Response at 21-22. Under that analysis, says Martorello, tribal law governs the loans, and any attempt to apply Virginia law to the loans violates the Tribe's sovereign authority and preempts federal law. Id. at 26.²⁵

The Indian Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce. . . with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Under that clause, "Congress has broad power to regulate tribal affairs," and federal law concerning tribal affairs preempts state law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980). Federal preemption and the "tradition of Indian sovereignty over the reservation and tribal members" together serve to limit the states' ability to interfere in tribal affairs. Id. at 143.

Tribal affairs are implicated when states attempt to regulate "\activity undertaken on the reservation or by tribal members." Id. at 143; see also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 205 (1987) (discussing regulation of "\non-Indians coming onto the reservations"). When tribal affairs are implicated, the Supreme Court has instructed that a multi-faceted

²⁵ Martorello reiterated these same arguments in his Motion for Summary Judgment. See DEFENDANT MATT MARTORELLO MEMORANDUM OF LAW OF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT at 18, 28 (ECF No. 1255).

test is to be employed to determine if state laws can apply. Id. at 145; Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs., 769 F.3d 105, 112 (2d Cir. 2014).

However, the Supreme Court has made clear that the Bracker test does not apply where a state imposed a regulation on "a non-Indian" engaging in "a transaction that occurs off the reservation." Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 99 (2005). And, "[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 795 (2014) (citation omitted).

Binding Fourth Circuit precedent makes clear that online tribal lending is considered "off-reservation" conduct. Hengle v. Treppa, 19 F.4th 324, 348-49 (4th Cir. 2021). Here, as in Hengle, the office of the entities that (at least nominally) issued the loans, Red Rock and Big Picture Loans, were "located on tribal land,"²⁶ but it is not disputed that the Plaintiffs in this case (the targets of the lending activity) "reside[d] on non-Indian lands when they applied for their loans online... and the effects of Defendants' allegedly illegal activities were felt by the Plaintiffs in Virginia," not on tribal land. Hengle, 19 F.4th at

²⁶ Loan Agreement at 2 (ECF No. 1-1).

348-49 (citing Gingras v. Think Fin., Inc., 922 F.3d 112, 121 (2d Cir. 2019); Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs., 974 F. Supp. 2d 353, 360-361 (S.D.N.Y. 2013); Colorado v. W. Sky Fin., LLC, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011); United States v. Hallinan, No. 16-cr-130, 2016 WL 7477767, at *1 n.2 (E.D. Pa. Dec. 29, 2016)); see Pls. Memo. in Supp. at 1 140; Martorello Response at 1140.²⁷

The undisputed record in this case establishes that the loan activities in this case are "directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct subject to nondiscriminatory state regulation." Hengle, 19 F.4th at 348-49 (citation omitted). And, there is no assertion that Martorello is a tribal member. Thus, on this record, the Bracker Indian Commerce Clause test is inapplicable.

Martorello also points to the NABDA and the NBA, arguing that these federal laws preempt the application of state law. Martorello

²⁷ When citing to the Plaintiffs' statement of facts, Pls. Memo. in Supp. at 5-26, the Court will refer to the numbered paragraphs therein. Martorello submitted both a "Counterstatement of Undisputed Material Facts," Martorello Response at 2-15, and a "Response to Plaintiffs' Statement of Facts," *id.* at 15-21, both of which use numbered paragraphs. All citations to numbered paragraphs in Martorello's Response correspond to the section titled "Response to Plaintiffs' Statement of Facts," not to Martorello's "Counterstatement."

Response at 26-29. But, he has identified neither a statutory provision nor a court decision that would permit a finding that those statutes preempt state usury laws. *Id.* Martorello also mentions, in passing, that "[t]he economics of a deal do not change the pre-emption analysis." *Id.* at 28. That conclusory argument cites authorities that, upon examination, have no bearing on the issues in this case. Indeed, that argument, like the NABDA and the NBA arguments, is so lacking in merit as to warrant summary rejection.

Therefore, unless there is an enforceable choice of law clause providing otherwise, Virginia law applies. The analysis turns next to that question.

(b) The Choice of Law Clauses in the Loan Agreements

The Loan Agreement's tribal choice of law clause states:

This Agreement will be governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribal law"), including but not limited to the [Tribal Consumer Financial Regulatory] Code as well as applicable federal law. All disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9 of the Code and summarized below for Your convenience.

Loan Agreement at 4 {ECF No. 1-1} (emphasis added).

Because "the parties have not provided the Court with any tribal law concerning contract interpretation," the Court "will apply the contract interpretation principles of the forum, Virginia." Hengle, 19 F.4th at 340 n.5; see also Williams II, 59

F.4th at 77-78 n.7. Choice of law clauses are often enforceable under Virginia law, Hengle, 19 F.4th at 349; however, those clauses are not given effect when enforcement is "contrary to compelling public policy." Id.

The choice of law clause in these loan agreements is contrary to public policy for two reasons. First, the clause violates federal public policy under the prospective waiver doctrine. Second, the clause violates Virginia's strong public interest against usurious loans.

As explained by the Fourth Circuit, "[t]he prospective waiver doctrine invalidates agreements that prospectively waive a party's right to pursue statutory remedies in certain circumstances" because such a waiver "violates public policy." Williams II, 59 F.4th at 80. In this case, the Fourth Circuit has found that this choice of law clause runs afoul of the prospective waiver doctrine. In so doing, the Fourth Circuit held that, notwithstanding its references to federal law, the Loan Agreement "in general" is "governed exclusively by Tribal law." Id. at 84 (emphasis added). And, although it is true that the Tribe's Regulatory Code²⁸ incorporates some federal consumer protection laws, it does not

²⁸ Lac Vieux Desert Band of Lake Superior Chippewa Indians Tribal Consumer Financial Services Regulatory Code ("Tribe's Regulatory Code") § 6.2 (ECF No. 1207-6).

include the federal statute (RICO) at issue in this litigation. Thus, under the terms of the Loan Agreement, Plaintiffs would not be able to "effectively vindicate their federal statutory rights" to relief under RICO. *Id.* at 25.

By denying Plaintiffs the ability to pursue those federal statutory remedies, the choice of law clause in these loan agreements violates the prospective waiver doctrine. The clause is therefore unenforceable for that reason alone. *Id.*

The choice of law clause in the loan agreements also is unenforceable because it is contrary to the Commonwealth of Virginia's public policy. The Tribe's Regulatory Code states:

Except as otherwise specified in this Code, a consumer financial services transaction may provide for such price, interest, time price differential, rent, fees, filing fees, and other charges as agreed upon by the parties.

Tribe's Regulatory Code § 7.2(b). The Tribe's Regulatory Code provides for no limitation on the interest charged on small loan transactions. *Id.* at § 11.²⁹ Virginia, on the other hand, has a "compelling public policy against unregulated usurious lending" and caps general interest rates at 12%. Hengle, 19 F.4th at 350,

²⁹ It appears that only vehicle loans are subject to a usury cap under the Tribe's Regulatory Code. Vehicle loans may not be subject to more than 390% annual interest rates. Tribe's Regulatory Code § 12. 2 (b) .

352 (citing Va. Code Ann. § 6.2-303(A)).³⁰ Therefore, as the Fourth Circuit has recognized, "unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrower-unquestionably 'shocks... one's sense of right' in view of Virginia law." Id. at 352 (quoting Tate v. Hain, 25 S.E.2d 321, 325 (Va. 1943)); see also Radford v. Cmty. Mortg. & Inv. Corp., 312 S.E.2d. 282, 285 (Va. 1984) ("The usury statutes represent a clarification of the public policy of the state that usury is not to be tolerated" (citation omitted)). Thus, under Virginia's compelling public policy, the choice of law clause is unenforceable.

In sum, neither the Indian Commerce Clause, the NABDA, the NBA, nor the choice of law provision in the loan agreements precludes application of Virginia's usury laws. For those reasons, the Court held that Plaintiffs are entitled to summary judgment on the choice of law issue. And that judgment is that Virginia law applies and governs, inter alia, the lawful interest rate. And, under RICO, any rate that exceeds twice the rate allowed by state law offends the RICO statute and is an unlawful debt.³¹

³⁰There are circumstances in which Virginia law allows interest rates in excess of 12%, but these loans do not fall within any exception. Martorello does not contend otherwise.

³¹After the Court found that Virginia law applied to the loans, June 16, 2023 ORDER (ECF No. 1328), Martorello conceded that the loans in question were "unlawful debt," as defined by 18 U.S.C. §

2. Mistake of Law Defense and Knowledge That Loans Were Unlawful

Martorello argues that he can assert, as a defense to RICO civil liability under § 1962(c) and § 1962(d), that he acted as he did on a mistaken belief of law that (1) the loans made by the alleged RICO enterprise were governed by tribal law and that, therefore, (2) those loans were legal under tribal law. Martorello Response at 33-34. Relatedly, Martorello also argues that to be liable under § 1962(d), "Plaintiffs must prove that Martorello knew that the loans were unlawful and, with that knowledge, intentionally conspired with co-conspirators to collect them." Martorello Response at 33 (emphasis added).

Plaintiffs assert that there is no "mistake of law" defense to liability under § 1962(c) or § 1962(d).³² They also take the view that neither § 1962(c) nor § 1962(d) requires proof that Martorello knew that the loans in question were unlawful. Id.

1961(6)}, June 7, 2023 Hearing Trans. at 171-72. Virginia caps interest rates at 12%, Va. Code Ann. § 6.2-303. Therefore, all loans in excess of 24% are "unlawful debts" under RICO. Here, it is undisputed that the "average [Annual Percentage Rate] for the consumer loans was 727.80%" and the lowest was 34.8887%. Pls. Memo. in Supp. at 1146; Martorello Response at 146.

³² PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT at 19-27 (ECF No. 1241).

(a) Mistake of Law

The mistake of law defense seems to have its genesis in Martorello's SEVENTH AFFIRMATIVE DEFENSE which is:

Defendant, Matt Martorello, at all times relevant acted in good faith and in a lawful manner towards consumers in conformity with all applicable laws and regulations.³³

During the course of the case and in their summary judgment briefs, the parties confused the record respecting the true nature of the defense because they variously referred to it as a "good faith" defense, a "mistake of law" defense, the "scienter question," or "advice of counsel." Indeed, the parties used all of those terms interchangeably to refer to what seemed to be the same issue: whether Martorello's alleged mistaken belief that tribal law governed the legality of the collected debt [the loans] at issue is available as a defense to COUNT TWO and COUNT THREE.

Of course, good faith, advice of counsel, scienter, and mistake of law are somewhat different, albeit sometimes related, concepts. So, at the June 7 hearing, the Court sought to understand the true nature of the defense that, in the briefs, bore these various sobriquets.³⁴

³³ **MATT MARTORELLO'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT** {ECF No. 35, p. 23}.

³⁴ Martorello advised that he was not presenting an advice of counsel defense.

At the June 7 hearing, counsel for Martorello clarified that, notwithstanding the various references made in the briefs and pleadings, Martorello indeed was relying on a mistake of law defense and whether such a defense was available to Martorello in defense of COUNT TWO and COUNT THREE. June 7, 2023 Hearing Trans. at 8, 45-46, 60-61 (ECF No. 1316). Counsel for the Plaintiffs agreed that was the issue.

But then, counsel for Martorello stated: "when I have conceived of this argument and I've drafted it, I did not refer to it as a mistake of law. So I may not use that terminology, but I'm certainly on the same page with what we're discussing and what we're arguing here." June 7, 2023 Hearing Trans. at 61.

MS. SIMMONS: Okay. So the threshold question we believe here is - and Your Honor has - has conceived of it as a mistake of law.

The question we think that the Court has to answer is-

THE COURT: Just a minute. Just a minute. I didn't conceive of it. You all conceived of it. He [Plaintiffs' counsel] agreed with that's what it was. The plaintiffs agreed that's what it was. It's in your briefs. It is articulated in three different ways, advice of counsel, good faith, mistake of law, but its predominant thesis is it's a mistake of law.

* * *

MS. SIMMONS: ... The question is does section 1962(d), the conspiracy section of the RICO statute, have a scienter element that would place the burden on Plaintiffs to show that Martorello willfully agreed that he, or some member of the alleged RICO conspiracy, would engage in the collection of unlawful debt. And we submit

that it does have that scienter requirement as the first point.

So in the *United States* --

THE COURT: Mark that right there. I need to have that typed up.

That isn't how these briefs read.

MS. SIMMONS: I think that it is how the --

THE COURT: It's a refinement on it that I don't think is quite in the papers.

MS. SIMMONS: It's certainly the intention of the portion of our opposition to their motion for summary judgment on this point.

{June 7, 2023 Transcript {\June 7 Tr."}, pp. 60-64.

Martorello's counsel then turned to United States v. Mouzone, 687 F.3d 207, 218 (4th Cir. 2012). There, the Court of Appeals, when deciding that a conviction for violating § 1962(d) did not require that the defendant have a role in directing the RICO enterprise, also made the statement that the § 1962(d) criminal liability charge had as an element that "each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." *Id.* at 218; June 7 Tr. at 62.

And counsel for Martorello continued:

MS. SIMMONS: And so the existence of Mr. Martorello's good faith belief goes to the question of whether or not he could have engaged in willful conduct.

In [another] case,³⁵ in a footnote, the Court said, nwillfulness generally requires a showing of knowledge of unlawfulness." And it did so in the citation to the Supreme Court's decision in Bryan v. United States at 524 U.S. 184.

So if we are correct, and we think we are, that a section 1962(d) claim requires a showing of willfulness to engage in the collection of unlawful debt, then Mr. Martorello should be entitled to present evidence of his good faith belief.

THE COURT: Good faith belief of what?

MS. SIMMONS: That he was not engaging in the collection of unlawful debt, that he - that he had a good faith belief that tribal law would apply to the loans.

* * *

THE COURT: So it's mistake of law.

MS. SIMMONS: Yes, Your Honor.

THE COURT: He made a mistake of law.

MS. SIMMONS: Yes, Your Honor.

THE COURT: Okay.

MS. SIMMONS: But the case law saying that mistake of law is not a defense we submit doesn't apply here because there is a willfulness element, which, in and of itself, allows a defendant to present evidence of his good faith belief that it wasn't unlawful. And so that's why this type of evidence is relevant.

{June 7 Tr., pp. 63-65) (emphasis added).

Thus, when all is said, Martorello wanted to defend against RICO liability by asserting the mistaken belief that tribal law,

³⁵ United States v. Grote, 961 F.3d 105 (2d Cir. 2020).

not Virginia law, governed whether the loans were unlawful (i.e., whether the debt being collected was unlawful). So, sobriquets notwithstanding, the issue to be decided is whether there is a mistake of law defense to the RICO civil conspiracy claim under § 1962(d), and to the claim under § 1962(c).

As matters now stand, Martorello's mistake of law defense has two purposes. First, he wishes to present the mistake of law argument to defend against a perceived willfulness element that Martorello says is in § 1962(d). Second, he wishes to use the mistake of law argument to defend against what he asserts to be the knowledge of illegality of the debt (the loans) element in § 1962(c) (which is alleged to be the object of the § 1962(d) conspiracy).

(b) The Mistake of Law Defense: Factual Basis

Before addressing those two issues, it is necessary to understand the factual basis for the mistake of law defense as Martorello presents it in the case. Because of the broad and vague text of Martorello's SEVENTH AFFIRMATIVE DEFENSE in his Answer and the varying sobriquets attached to it in subsequent discovery responses and briefs, Martorello was ordered to submit a statement detailing his mistake of law defense and produce all documents reflecting the sources of his belief that tribal law applied (ECF No. 1247). In response, Martorello submitted fifty documents that

purportedly reflected written advice, or the substance of oral advice, provided to Martorello to support his belief that tribal law applied to the loans at issue and that, therefore, the debt being collected was not unlawful.³⁶

For various reasons set forth on the record, the Court sustained the Plaintiffs' objections to the use of most of the proffered documents. In so doing, the Court narrowed those documents to seven exhibits.³⁷

Those documents fit into three categories:³⁸ (1) letters from lawyers who are counsel to online tribal lending expressing the view that tribal laws govern the loans;³⁹ (2) communications showing that, in 2013 and 2014, Martorello was aware of the decision in Otoe that was adverse to rent-a-tribe online lending

³⁶ DEFENDANT MATT MARTORELLO' S STATEMENT OF POSITION REGARDING GOOD FAITH DEFENSE PURSUANT TO ORDER AT DOCKET NO. 1247 at 9-17 (ECF No. 1275} (unsealed version at ECF No. 1261}.

³⁷ BB (ECF No. 1264-13; refiled at ECF No. 1396 with email attachment per ECF No. 1394), EE (ECF No. 1261-31), KK (ECF No. 1264-18}, MM (ECF No. 1264-20; refiled at ECF No. 1396-1 with email attachment per ECF No. 1394}, CCC (if foundation was provided) (ECF No. 1264-29; refiled at ECF No. 1396-2 with email attachment **per ECF No. 1394}**, **HHH {ECF No. 1264-32}**, **and JJJ {ECF No. 1261-62}**. See June 7 Hearing Trans. at 270-272, 284, 286, 297, 298, 3030, 307-08, 310, 313, 318.

³⁸ Some of the exhibits of which do not reflect that Martorello even received or saw them and for which that foundation must be laid if they are to be admitted.

³⁹ Exhibits **BB**, **KK**, and **JJJ**.

that, in turn, necessitated the decision to suspend the Martorello/Tribe online lending in New York;⁴⁰ and (3) a 2015 letter from Rosette, LLP, counsel for many tribes, including the Tribe, outlining a strategy to deal with the Otoe decision.⁴¹

Assuming that those documents are admissible (i.e., that Martorello was aware of them at the relevant times), they are probative of Martorello's assertion that he believed that Tribal law governed the loans at issue (the debt being collected} . However, those documents are not the only evidence pertaining to the mistake of law defense.

For example, in his briefing, Martorello says that he knew "tribal lending... was under legal and regulatory attack in some quarters throughout the relevant period of time." Martorello Response at 35.⁴² And, the record as a whole reflects that Martorello knew that he was operating in, at-best, a grey area of the law. In fact, in 2012, he said that the tribal lending "industry is going to be living in the grey area of its legality for another year or two" and noted that "[w]e have received dozens of letters from State AGs saying we need to be licensed and sending

⁴⁰ Exhibits EE and MM.

⁴¹ Exhibit KK.

⁴² Exhibits EE and MM confirm that to be so.

Cease and Desist order." Martorello to Argyros Email at 13-14 (ECF No. 1266-1); see also Connecticut Cease & Desist Letter (ECF No. 1166-20).

Martorello closely followed successful lawsuits against, and criminal prosecutions of, other players in the rent-a-tribe lending industry. Martorello to Argyros Email at 12; Martorello to Rosette Email at 1 (ECF No. 1166-19); Martorello to Wichtman Email (ECF No. 1166-26). Martorello was so concerned about his own liability that he asked two attorneys to put together an opinion letter detailing his potential for personal criminal liability for the online lending rent-a-tribe involved in this case. In response, the attorneys stressed "[t]here isn't a bright-line answer here from a legal standpoint" and informed him that "[i]t is possible that individual or third-party service-providers could be held liable for criminal violations of Georgia [and other states'] law." Weddle & Compton Email & Memo to Martorello at 2, 14 (ECF No. 1270-2) (emphasis added). Martorello summed up the content of this email and the accompanying memorandum to say "something like ... 'yes it is possible the state will come after you for helping the tribe lend against their [the state's] laws and charge YOU for aiding and abetting as a felony crime in their state (in some instances penalty could be jail time), but we don't think it's going to happen.'" Martorello to Argyros Email at 14 (ECF No. 1266-1).

Another attorney advised Martorello that "it will be an uphill battle" to persuade a court that the loans were legal in a civil proceeding. Wichtman to Martorello Email at 3 (ECF No. 1166-22}.

In sum, Martorello knew that the online rent-a-tribe operation in which he was engaged was of questionable legality; that courts had held that tribal law did not apply to tribal online lending; that, in a civil proceeding, it would be difficult ("uphill") to persuade a court that the loans were legal; and that, if he persisted in asserting that tribal law governed the loans, he might face state felony prosecution. And, he knew that the tribal lawyers knew as much even while asserting their belief that tribal law applied.⁴³ With that knowledge, and aware that online tribal lenders had been found to be wrong by the federal courts in New York, Martorello deliberately took the risk that his guess about what law would apply might well be wrong.

Of course, Martorello's mistake of law defense cannot rest on documentary evidence alone. In particular, because his defense depends on his knowledge and subjective belief, Martorello cannot rely on his mistake of law defense unless he testifies to what his belief was and why he held it.

⁴³ Exhibits BB, EE, KK, MM, CCC, HHH, and JJJ cited on p. 31, supra.

Considering that this Court and the Court of Appeals has held that Martorello previously has lied under oath about topics that are pertinent to the mistake of law defense,⁴⁴ it would be quite surprising if Martorello were to testify at trial. If he does not, there could be no mistake of law defense. However, counsel has represented that Martorello will testify at trial. So, at this stage, it must be assumed that he will and that he would say that he held the belief that tribal law governed whether the loans were unlawful debt.

That, in sum, is the factual predicate for what Martorello calls the mistake of law defense. Whether that fact basis could constitute a mistake of law defense is not now before the Court. But, assuming that it could, the question is whether that defense is even available to Martorello in defense of the RICO counts.

(c) Willfulness and the Mistake of Law Defense

To assess Martorello's position on his mistake of law defense, it is necessary to understand the elements of § 1962(c) and (d). Subsection (c) is involved in the analysis of liability under COUNT TWO and under COUNT THREE because COUNT THREE alleges a conspiracy to violate § 1962(c).

The starting point is the statutory text.

⁴⁴ Williams v. Big Picture Loans, LLC, No. 3:17-cv-461, 2020 WL 6784352 (E.D. Va. Nov. 8, 2020); Williams II, 59 F.4th at 89-90.

Section 1962(c) reads, in full:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (emphasis added). To establish the collection of unlawful debt, Plaintiffs must show that the defendant "(1) conducted [or participated in conducting] the affairs of an enterprise (2) through the collection of unlawful debt (3) while employed by or associated with (4) the 'enterprise engaged in, or the activities of which affect, interstate or foreign commerce.'"⁴⁵ Gibbs v. Stinson, 421 F. Supp. 3d 267, 312 (E.D. Va. 2019), aff'd on different grounds sub nom. Gibbs v. Sequoia Cap. Operations, LLC, 966 F.3d 286 (4th Cir. 2020) (quoting § 1962(c)); see also Salinas v. United States, 552 U.S. 52, 62 (1997) (holding that "[t]he elements predominant in a subsection (c) violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity [like the collection of unlawful debt]").

⁴⁵ It is undisputed that the loans involved interstate or foreign commerce. There is also no dispute that Plaintiffs were injured by the alleged RICO violation. See Nunes v. Fusion GPS, 531 F. Supp. 3d 993, 1012-1013 (E.D. Va. 2021).

Section 1962(c) does not mention willfulness. In that situation, it is often helpful to examine what the instructions would be if the case were to go to trial.

A widely used instruction on civil RICO liability delineates the elements of § 1962(c) as follows:

In order to prove that the defendant violated section 1962(c), plaintiff must establish by a preponderance of the evidence each one of the following five elements:

First, that an enterprise existed as alleged in the complaint;

Second, that the enterprise affected interstate or foreign commerce;

Third, that the defendant was associated with, or employed by, the enterprise;

Fourth, that the defendant engaged in a pattern of racketeering activity (or the collection of an unlawful debt); and

Fifth, that the defendant conducted, or participated in, the conduct of the enterprise through that pattern of racketeering activity (or collection of an unlawful debt).

Modern Federal Jury Instructions (Civil), § 84-23 {emphasis added}.

The instruction, like the statutory text, does not mention that willfulness is an element to be proved in establishing a civil

claim under Section 1962(c).⁴⁶ Accordingly, Martorello's purported purpose to use a mistake of law defense to counter a willfulness element in a Section 1962(c) claim is not supportable.

But, were willfulness an element of a Section 1962(c) claim, the jury would be told that:

The term "willfully," as used in these instructions to describe the alleged state of mind of defendant . means that he acted knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

1A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, § 17.05 (6th ed. 2008). The "mistake of law" defense, as Martorello would present it, would not be probative to refute that Martorello's participation in directing the affairs of the enterprise was knowing, deliberate, and intentional.

More importantly, mistake of law defenses are heavily disfavored in civil cases and should not be allowed here. The Supreme Court has "long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 558 U.S. 573, 581 (2010) (quoting Barlow v. United States, 7 Pet. 404, 411 (1833) (opinion for the Court by

⁴⁶ Section 1962(c) is both a claim in its own right and is also necessary to the § 1962(d) claim, which requires proof that the object of the RICO conspiracy was to violate § 1962(c).

Story, J.)); see also id. at 582 n.5 (referring to the n•venerable principle' that ignorance of the law generally is no defense") (quoting *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994)); United States v. Evans, No. 2204307, slip op. at 13 (4th Cir. July 25, 2023).

As a result, individuals are nonetheless liable for their actions even if they, in good faith, believe that they are acting in accordance with the law. See United States v. Fuller, 162 F.3d 256, 261-62 (4th Cir. 1998). Indeed, as the Supreme Court has made clear, American "law is ... no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law." German, 599 U.S. at 582-83. The "background presumption must be that 'every citizen knows the law.'" Fuller, 162 F.3d at 262 (quoting Bryan v. United States, 524 U.S. 184, 193 (1998)).

There are, of course, some instances when ignorance of the law may be a defense to civil liability under federal law. However, "when Congress has intended to provide a mistake of law defense to civil liability, it has often done so more explicitly than here." German, 559 U.S. at 583 (discussing the Fair Debt Collection Practices Act). Congress did not do so when it enacted RICO. Martorello does not contend otherwise.

Martorello's mistake of law defense does not fare better under Section 1962(d) which provides that:

It shall be unlawful for any person to conspire to violate any of the provisions of subsection 1(f) of this section.

18 U.S.C. § 1962(d) (emphasis added). The statutory text of § 1962(d) does not mention willfulness. "[T]o prove a RICO conspiracy, the Plaintiffs must establish: (1) that two or more people agreed to commit a substantive RICO offense; and (2) that the defendant knew of and agreed to the overall objective of the RICO offense." Blackburn v. A.C. Israel Enters., No. 3:22cv146, 2023 WL 4710884, at *31 (E.D. Va. July 24, 2023) (quoting Solomon v. Arn. Web Loan, No. 4:17cv145, 2019 WL 1320790, at *11 (E.D. Va. March 22, 2019)) (emphasis added); see also Mao v. Glob. Tr. Mgmt., LLC, No. 4:21CV65, 2022 WL 989012, at *12 (E.D. Va. March 31, 2022). RICO conspiracy does not require "some overt act or specific act" and is therefore "even more comprehensive" than the general conspiracy statute. Salinas, 522 U.S. at 63. "The partners in the criminal plan must agree to pursue the same criminal objective . . .," "even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." Id. at 63-64.

RICO does not include a definition of "conspiracy," but we are not without guidance. "When Congress uses a term with a well-established meaning, we presume-absent evidence otherwise-that

Congress intends to adopt that meaning, because Congress is presumed to be aware of judicial interpretations." Jackson v. Home Depot U.S.A., Inc., 880 F.3d 165, 171 (4th Cir. 2018), aff'd, 139 S. Ct. 1743, 204 L. Ed. 2d 34 (2019); see also Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 652 (2008) (describing "the presumption that Congress intends to adopt the settled meaning of common-law terms"). By adopting "terms of art in which are accumulated the legal tradition and meaning of centuries of practice," Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word." Morrisette v. United States, 342 U.S. 246, 264 (1952). "Conspiracy" is, of course, a legal term of art with "a settled common-law meaning." Bridge, 553 U.S. at 652.

Of course, "[t]he function of a conspiracy claim differs in criminal and civil cases." Beck v. Prupis, 162 F.3d 1090, 1099 n.18 (11th Cir. 1998), aff'd, 529 U.S. 494, 501-03 (2000). So, the question becomes: when determining the meaning of RICO conspiracy as alleged in this civil action, do we look to the civil common law or the criminal common law? The answer depends upon which enforcement provision is the basis for the action. If an action is being brought pursuant to 18 U.S.C. § 1963, setting forth criminal penalties for RICO violations, the criminal common law applies. Salinas, 522 U.S. at 63 ("When Congress uses well-settled

terminology of criminal law, its words are presumed to have their ordinary meaning and definition.") . But, if the action is being brought pursuant to 18 U.S.C. § 1964,⁴⁷ providing for civil remedies, we look to the civil common law. Beck, 529 U.S. at 501 n.6 {holding that, when interpreting § 1962(d) in conjunction with § 1962 {c) , "[t]he obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy") . Because this case is a civil action, we look to the civil common law definition of "conspiracy."

In contrast to criminal law, where "the requirement of some mens rea for a crime is firmly embedded" in the "background rules of the common law," Elonis v. United States, 575 U.S. 723, 744 {2015} (Alito, J., concurring in part) {quoting Staples v. United States, 511 U.S. 600, 605 {1994}}, civil liability is "more strict," Morrisette, 342 U.S. at 254. When it comes to civil torts, "the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant." Id. at 270. That principle applies where the claim is one for civil conspiracy. According to the Restatement, an individual is liable for civil conspiracy if:

⁴⁷ Section 1964 sets forth two forms of civil remedies: proceedings instituted by the Attorney General pursuant to § 1964 (b) and proceedings instituted by private individuals pursuant to § 1964(c).

(a) the defendant made an agreement with another to commit a wrong; (b) a tortious or unlawful act was committed against the plaintiff in furtherance of the agreement; and (c) the plaintiff suffered economic loss as a result.

Restatement (Third) of Torts: Liability for Economic Harm § 27
(Am. Law Ins. 2020) (emphasis added).

The Restatement does not require that the defendant to a civil conspiracy claim know that the purpose to which he agreed was unlawful. Civil conspiracy only requires an agreement to accomplish "an unlawful purpose." Here, Martorello agreed to the collection of debts with interest rates above 24%. Although that was an unlawful purpose, Martorello's civil conspiracy liability does not require proof that he knew that the purpose was unlawful.

No doubt, it must be shown that the defendant knowingly agreed to join the conspiracy alleged under 18 **U.S.C.** § 1962(d). And, the act of joining the conspiracy would have to be willful on the part of the defendant. But here too the jury would be told:

The term "willfully," as used in these instructions to describe the alleged state of mind of defendant . means that he acted knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

1A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, § 17.05 (6th ed. 2008). And, as is the case under § 1962(c), Martorello's mistake of law defense would not be probative to

refute that his joining the conspiracy was knowing, deliberate, or intentional.

But, in any event, that is not Martorello's willfulness issue: his willfulness contention is that, although he was aware that tribal law had been held inapplicable to rent-a-tribe online lending operations such as his, he nonetheless subscribed to the view that tribal law governed and, because of that mistake of law, he did not act willfully. For the reasons explained above in discussing the defense as to § 1962(c), the general, well-settled principles of Jermain, Barlow, and Fuller foreclose such a defense to the claim under § 1962(d), COUNT THREE.

So, as is true of the Section 1962(c) claim in COUNT TWO, there is no place for a mistake of law defense in responding to a willful component of the claim under Section 1962(d) (COUNT THREE). And, for the reasons previously given,⁴⁸ there is no more place for the mistake of law defense in defending the civil conspiracy claim under Section 1962(d) than there is in defending the civil Section 1962(c) claim.

A final word about Martorello's citation to United States v. Mouzone. Martorello relies on the statement in Mouzone that an element of § 1962(d) criminal liability is "that each defendant

⁴⁸ See pp. 38-39, supra.

knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." 687 F.3d at 218.

Assuming that actually is an element necessary in a criminal case, the willful aspect in that element is attached to the agreement to commit the alleged racketeering act, whatever it might be. Nothing in that formulation requires proof that the defendant knew that the racketeering act to be committed was an unlawful one.

And, in any event, the jury would be told that:

The term "willfully," as used in these instructions to describe the alleged state of mind of defendant . means that he acted knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

So, the general rules about mistake of law would apply and a mistake of law would not preclude civil liability under § 1962(d) as alleged in COUNT THREE.

That then brings the analysis to the second aspect of Martorello's theory: using the mistake of law defense to counter what Martorello perceives (erroneously) to be an element of RICO liability: knowledge that the loan itself was illegal.

(d) Knowledge of Illegality of the Loans

As explained above, Martorello also asserts the mistake of law defense against what he erroneously perceives to be another

element of the claims under both Section 1962(c) and Section 1962(d). Specifically, Martorello argues that Plaintiffs must prove that he knew that the loans were unlawful, and that his mistake of law defense is available to counter that element. For the reasons set forth below, this twist on Martorello's mistake of law defense also lacks merit.

To begin, the text of neither § 1962(c) nor § 1962(d) say that knowledge that the loans (the asserted unlawful debt) are illegal is an element of the RICO claims asserted in COUNTS TWO and THREE. Nor does the definition of "unlawful debt" in § 1961(6) say that such knowledge is required. So, the statutory text does not predicate liability on a finding of a defendant's knowledge that the collected debt is an unlawful one. That is not dispositive, but it is helpful in deciding whether Congress intended RICO liability for collecting an unlawful debt to necessitate proof that a defendant knew the debt to be unlawful.

When determining whether knowledge of the illegality of the loans is required, it is helpful to look to the elements of the respective claims. The elements of a § 1962(c) claim do not require knowledge of the illegality of the loans. Gibbs v. Stinson, 421 F. Supp. 3d at 312 (E.D. Va. 2019); Mao, 2022 WL 989012, at *9; Gibbs v. Elevate Credit, No. 3:20cv632, 2021 WL 4851066, at *15 (E.D. Va. Oct. 17, 2021) (quoting Slay's Restoration, LLC v. Wright Nat'l

Flood Ins. Co., 884 F.3d 489, 493 (4th Cir. 2018)); see also Solomon v. Am. Web Loan, No. 4:17cv145, 2019 WL 1320790, at *5-6 (E.D. Va. March 22, 2019) {quoting Dillon v. BMO Hams Bank, N.A., 16 F. Supp. 3d 605, 618 (M.D.N.C. 2014)}.

Nor do the elements of a § 1962(d) civil claim bespeak the need for proof of knowledge that the predicate acts (here, collection of unlawful debt) are illegal. To be found liable of RICO conspiracy, a defendant must have "by either words or action, objectively manifested an agreement to participate directly or indirectly in the affairs of the enterprise." United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985). Plaintiffs "need not establish that each conspirator had knowledge of all the details of the conspiracy but, rather, only that the defendant participated in the conspiracy with knowledge of the essential nature of the plan." *Id.* (emphasis added). Unlike the general conspiracy statute, § 1962(d) contains "no requirement of some overt act or specific act." Salinas, 552 U.S. at 63. "The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense." *Id.*

When evaluating a motion to dismiss, the court found in another civil tribal lending case that "Plaintiffs do not have to allege knowledge of illegality." Mao, 2022 WL 989012, at *9. Instead, the Plaintiffs must show that the enterprise members,

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including Martorello, were "associated together for a common purpose of engaging in a course of conduct." Id. (quoting United States v. Turkette, 452 U.S. 576, 583 (2009)). The "purpose" requirement "may be [satisfied with a showing that] Defendants associated for the purpose of collecting unlawful debt, whether they knew that debt was unlawful or not." Id. (emphasis added).

Here too, it is helpful to consider the way in which the jury would be instructed. To secure the views of the parties on that subject, the Court called upon them to provide their views of what the instructions would be on the two RICO claims. (ORDER, ECF No. **1247**) .

Martorello's provided instructions were from United States v. Tucker, No.16-cr-91 (PKC), 2020 WL 6891517 (S.D.N.Y. Nov. 24, 2020}, a 2017 criminal RICO case.⁴⁹ Tucker Jury Instructions (ECF No. 1253-1).so On the conspiracy charge, the Court instructed the jury that the Government must prove that "each defendant intentionally joined the conspiracy" and did so "knowingly and willfully... for the purpose of furthering its unlawful object,

⁴⁹ United States v. Grote, 961 F.3d 105 (2d Cir. 2020), discussed in further detail below, is related to this case.

so DEFENDANT'S NOTICE OF FILING PURSUANT TO ORDER AT DOCKET NO. 1247 OF JURY INSTRUCTIONS GIVEN IN OTHER UNLAWFUL DEBT RICO CASES (ECF No. 1253).

which is the collection of an unlawful debt." Id. at 3287.⁵¹ The Tucker Court instructed that "the government must prove... that the defendant willfully and knowingly engaged in the collection of unlawful debt." Id. at 3296.

Then, as to whether the defendant acted "willfully" and "knowingly," the Court instructed that "[t]he defendant need not have known that he was breaking any particular law, but he must have been aware of the generally unlawful nature of his act." Id. at 3288 (emphasis added). The Government also did not need "to prove that the defendant knew what the usury rates were in the states that the borrowers lived." Id. at 3293 (emphasis added). The Court in Tucker summed up its instructions on that point by stating:

In this case, ignorance of the specific terms of any law is no excuse to the charged conduct. The government can meet its burden on the "willfully" and "knowingly" element by proving that a defendant acted deliberately, with knowledge of the actual interest rate charged on the loan. It may also meet its burden by showing a defendant acted deliberately, with an awareness of the generally unlawful nature of the loan, and also that it was the practice of the business engaged in lending money to make such loans.

⁵¹ The pagination is from the original case transcript.

Id. at 3293-94 (emphasis added).⁵² So, even Martorello's view does not necessitate proof that he knew the specific interest rate charged or that the debt being collected was an unlawful one.

Plaintiffs attached four different sets of jury instructions but only two of these had actually been given at trial. PLAINTIFFS' STATEMENT OF POSITION IN RESPONSE TO THE COURT'S ORDER DATED MAY 19, 2023 at 2 (ECF No. 1252). One of the offered instructions comes from Tucker and has been discussed. The other given instructions come from the 2019 Northern District of California civil RICO case Planned Parenthood Federation of America, Inc. v. Center for Medical Progress, Case No. 3:16-cv-236 (N.D. Cal. 2019). Id. The claim in Planned Parenthood involved a theory of "pattern of racketeering activity," rather than collection of unlawful debt. Thus, this does not directly answer the question whether Martorello needed to know that the debts were unlawful. However, in Planned

⁵² In Tucker, the Court did allow for an advice of counsel defense. The Court instructed the jury to:

consider whether, in seeking and obtaining advice from lawyers, [the defendant] *intended for his acts to be lawful*. If he did so, a defendant cannot be convicted of a crime that requires willful and unlawful intent, even if such advice were an inaccurate description of the law.

Id. at 3301 (emphasis added). However, Martorello is not presenting an advice of counsel defense.

Parenthood, the Court did provide guidance on RICO. It instructed that, to show that a defendant had associated with the enterprise, "Plaintiffs must prove that the Defendant was connected to the enterprise in some meaningful way and that the Defendant knew of the existence of the enterprise and of the general nature of its activities." Planned Parenthood Jury Instructions at 60 (ECF No. 1252-1) (emphasis added). As to the conspiracy question, the Court instructed that:

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even if the person does not have full knowledge of all the details of the conspiracy.

Id. at 66. Notably, there is no requirement that the defendant know that the alleged acts of racketeering are illegal.

Neither respected instruction book specifies knowledge of illegality as an element of either 1962(c) or (d). That, of course, teaches that a mistake of law as to the legality of the underlying unlawful debt could be no defense to the Subsection (c) aspect of the conspiracy claim.

The Fourth Circuit has not addressed whether, in a civil RICO case, the defendant must have knowledge of illegality, but other federal courts of appeals have. In 1980, the United States Court of Appeals for the Second Circuit squarely held that RICO "does not include a scienter element over and above that required by the

predicate crimes." United States v. Boylan, 620 F.3d 359, 361-62 (2d Cir. 1980). Six years later, in United States v. Biasucci, 786 F.2d 504 (2d Cir. 1986), cert. denied, 479 U.S. 827 (1986), the Second Circuit rejected an argument that the "government was required to establish that [the defendants] had knowledge of the specific interest rates" on the loans at issue, i.e., knowledge of the illegality of the loans. Id. at 512-13. In so doing, the Second Circuit, citing Boylan, reiterated that "RICO imposes no additional mens rea requirement beyond that found in the predicate crimes." Id. at 512. And so, "we look to the scienter elements found in the statutory definitions of the predicate crimes to determine the degree of knowledge that must be proved to establish a RICO violation." Id.

Finding that the New York usury law (the predicate crime) "does not require specific intent to violate the usury laws," the Second Circuit declined to find that the government had to have proven that the defendant had knowledge of the specific illegal interest rate. Id. Thereupon, the Second Circuit approved the district court's instruction that the RICO scienter requirement could be satisfied "either by proving specific knowledge of the interest rates on the usurious loans, or by showing the defendant's awareness 'of the general unlawful nature of the particular loan in question and also that it was the practice of the lenders to

make such loans." Id. (emphasis added) (quoting the trial court's jury instructions).

The Second Circuit also found that neither the statutory language nor the policies underlying RICO and the predicate state law "impel us. . . to require knowledge of the specific interest rates charged on usurious loans." Id. Indeed, because "one of Congress' principal aims" in enacting RICO was to eliminate loansharking, and because "Congress expressly commanded that the RICO statute 'be liberally construed to effectuate its remedial purposes,'" it "could not have intended to hobble the government's ability to combat loansharking by requiring it to prove knowledge of the specific interest rates charged." Id. (citation omitted) (quoting U.S. v. Ruggiero, 726 F.2d 913, 919 (2d Cir. 1984)).

Martorello correctly notes that, in United States v. Grote, 961 F.3d 105 (2d Cir. 2020), the Second Circuit, in dicta, queried whether Biasucci was consistent with a "presumption in favor of a scienter requirement" for criminal statutes, as provided in Elonis, 575 U.S. at 727, and United States v. X-Citement Video, Inc., 513 U.S. 64 (1994). Grote, 961 F.3d at 117-19.⁵³ In United States v. Moseley, 980 F.3d 9, 19 (2d Cir. 2020), the Second

⁵³ DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ("Martorello Response") at 33 (ECF No. 1218).

Circuit noted Grote, but, like Grote, declined to depart from Biasucci concluding only that the defendant must be aware of the unlawful nature of his actions.

In any event, Elonis does not help Martorello in his assertion that the mistake of law defense, as he would present it, is available in this case. Indeed, Elonis quite plainly says that, even in a criminal case, where guilty mind is an element in every crime:

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim 'ignorance of the law is no excuse' typically holds true. Instead, our cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' [citation omitted] even if he does not know that those facts give rise to a crime.

Elonis, 575 U.S. at 735 (emphasis added). The dicta in Grote notwithstanding, Elonis does not support Martorello's view that he can present a mistake of law defense.

The Second Circuit's approach in Biasucci has met with approval from the United States Court of Appeals for the Eleventh Circuit. In United States v. Pepe, the Eleventh Circuit agreed with Biasucci that "[a] plain reading of the statute indicates that RICO does not contain any separate mens rea or scienter elements beyond those encompassed in its predicate acts." 747 F.2d 632, 675-76 (11th Cir. 1984) (emphasis added). The Eleventh Circuit went on to explain that the district court correctly

instructed, as to the § 1962(d) conspiracy charge, that \\the defendant with knowledge of the conspiracy, willfully became a member of the conspiracy by agreeing to participate." Id. at 676. That instruction would, of course, be given as to COUNT THREE at the trial of this case, but it certainly does not open the door to a mistake of law defense. And, as to the § 1962(c) charge, the Eleventh Circuit approved the district court's charge that the jury had to find that the \\defendant was engaged in a pattern of racketeering activity ... by knowingly and willfully committing at least two acts of racketeering activity or knowingly and willfully collecting an unlawful debt." Id. at 676 (internal quotations omitted). That instruction would be appropriate here as well, but, as the Eleventh Circuit explained, it does not require \\a mens rea or scienter requirement beyond those encompassed in the predicate acts." So, if the Virginia law does not require proof that the defendant knew the loan was illegal (and it does not), then neither does § 1962(c). And, as is true with § 1962(c), the willful aspect of the instruction (knowingly and willfully) modifies the act of collecting, not whether the debt was unlawful. And, the instruction certainly does not suggest that a mistake of law defense is available.

In addition to Mao, two other district courts within the Fourth Circuit, in deciding civil RICO cases, have endorsed the

Second Circuit' s Biasucci view. The Western District of North Carolina, citing to a District of Connecticut decision governed by Biasucci, found that "[t]he plaintiff must demonstrate, with respect to a defendant, both that the defendant committed a predicate offense as delineated in Section 1961 [the definitions section] and that the defendant had the requisite scienter for the underlying predicate offense." Smith v. Chapman, No. 3:14-cv-00238, 2015 WL 5039533, at *7 (W.D.N.C. Aug. 26, 2015) (emphasis added) (quoting Interstate Flagging, Inc. v. Town of Darien, 283 F. Supp. 2d 641, 645 (D. Conn. 2003)). The Middle District of North Carolina reached the same conclusion, finding "[i]t appears there is no mental state requirement 'beyond that found in the predicate crimes.'" Dillon v. BMO Harris Bank, N.A., 16 F. Supp. 3d 605, 618 (M.D.N.C. 2014) (emphasis added) (quoting Biasucci, 786 F.2d at 514).

Moreover, even in criminal cases, "[t]he presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Carter v. United States, 530 U.S. 255, 269 (2000) (quoting X-Citement Video, 513 U.S. at 72). When it comes to general intent crimes, the prosecution only needs to prove "knowledge with respect to the actus reus of the crime." *Id.* In other words, a defendant "generally must 'know the facts that make

his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." Elonis, 575 U.S. at 735 (emphasis added) (quoting Staples v. U.S., 511 U.S. 600, 608 n.3 (1994)). This, of course, is a manifestation of the principle that there is no mental state requirement beyond that found in a predicate crime. It also reinforces the principle that a mistake of law defense is no defense at all.

In United States v. Lawson, 677 F.3d 629, 652 (4th Cir. 2012), the Fourth Circuit considered a position like Martorello's under 18 U.S.C. § 1955, which prohibits illegal gambling. Section 1955, which is quite similar to § 1962, provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." The statute goes on to define "illegal gambling business" as a "gambling business which is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b) (1) (i) .

In reviewing a defendant's conviction under that provision, the Fourth Circuit rejected the defendant's argument that the jury should have been instructed that she "must have known that her conduct constituted gambling under [applicable state] law." Lawson, 677 F.3d at 652. The Court of Appeals reasoned that the

"plain language" of the statute sets forth a general intent crime and thus "does not require the government to establish that the defendant knew that their conduct violated state law." Id. at 652-53.

The same holds true for § 1962. "Conduct" and "participate," the operative verbs in § 1962, impute the same scienter requirement as § 1955's operative verbs, which include "conduct." In addition, both the definition of "gambling business" and "unlawful debts" incorporate state law. 18 U.S.C. § 1961(6). Mirroring the statutory framework of § 1955, when used in a criminal prosecution, § 1962 is a general intent crime. And, when a general intent crime is involved, a "good-faith instruction [which, in Lawson, was based on a mistake of law] . . . is unavailable." Lawson, 677 F.3d at 653.

The teaching of Lawson, applied in the civil context, is that §§ 1962(c) and (d) do not require knowledge of illegality of the collected debt as an element of either COUNT TWO or COUNT THREE. Lawson likewise teaches that Martorello may not raise a mistake of law defense based on the notion that he did not know the loans were illegal, because he chose to take the view tribal law applied, but guessed wrongly.

In this case, of course, RICO is being asserted as the basis for civil liability. Courts follow much of the same process in

determining if a civil statute contains a scienter requirement. First, they look to the language of the statute to ascertain congressional intent. For example, when it has intended to excuse mistakes of law, Congress has required violations to be "willful." German, 559 U.S. at 584-85. Even more explicitly, Congress sometimes includes a mistake of law defense. It did so, for instance, in the Fair Debt Collection Practices Act ("FDCPA") by requiring that the defendant acted with "actual knowledge or knowledge fairly implied" that his action was prohibited by the statute. *Id.* at 584 (quoting 15 U.S.C. §§ 45(m)(1)(A), (C)). The RICO statute, on the other hand, contains no provision requiring that the defendant knew his conduct (collection of an unlawful debt) was unlawful. Nor does it provide a mistake of law defense.

The Supreme Court also has had multiple occasions to consider scienter requirements in the various provisions of the Securities and Exchange Act of 1934, making it an especially useful comparison statute. For example, in assessing § 10(b), which makes it unlawful to "use or employ" "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities, 15 U.S.C. § 78j(b), the Supreme Court determined that Congress had imposed a scienter requirement for liability under this provision by using "[t]he words 'manipulative or deceptive'." in conjunction with 'device or contrivance' "Ernst & Ernst v.

Hochfelder, 425 U.S. 185, 197 (1976). The ordinary meaning of those words, particularly "manipulative," "make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence." Id. at 199. "[M]anipulative," so the Supreme Court explained, "connotes intentional or willful conduct designed to deceive or defraud." Id.

In contrast, the Supreme Court found that another provision in the Act, prohibiting "any person from obtaining money or property 'by means of any untrue statement of a material fact or any omission to state a material fact,' is devoid of any suggestion whatsoever of scienter requirement." Aaron v. Securities & Exchange Comm., 446 U.S. 680, 696 (1980) (quoting § 17(a)(2) of the Securities and Exchange Act of 1934). Likewise, the Supreme Court determined that a prohibition on "'engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit' . quite plainly focuses upon the effect of particular conduct on members of the investing public, rather than on the culpability of the person responsible." Id. at 696-97 (quoting § 17(a)(3) of the Securities and Exchange Act of 1934). Therefore, that provision was found not to contain a scienter requirement.

RICO contains no language that overcomes the presumption against mistake of law defenses. Section 1962(c) contains no

scienter requirement, see supra, nor does it contain an explicit mistake of law defense like the FDCPA. The language used by § 1962(c) - "conduct or participate" in conjunction with "collection" - does not connote the sinister intentions implicit in "manipulative" or "deceptive" as found in § 10(b) of the Securities and Exchange Act. Instead, these terms are far more similar to "engage," as found in § 17(a)(3) of the Act, which does not excuse mistake of law.

In addition to evaluating statutory text, the Supreme Court has also turned to legislative history to understand Congressional intent. Hochfelder, 425 U.S. at 201. Considering the history of § 10(b) of the Securities and Exchange Act, the Supreme Court determined that the legislative history indicated Congress only wanted to impose liability on those who act other than in good **faith. Id. at 206.**

With RICO, on the other hand, the legislative history supports the opposite conclusion. RICO itself contains a provision instructing that "its terms are to be 'liberally construed to effectuate its remedial purposes.'" Boyle v. United States, 556 U.S. 938, 944 (2009) (quoting § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961). And supporters of the bill were especially concerned with loansharking. Turkette, 452 U.S. at 591-92 & n. 14 (considering RICO's legislative history). Congress's

remedial intentions in passing RICO, therefore, would not be advanced by "permit[ting] the defendant to avoid [liability] by simply claiming that he had not brushed up on the law." Hamling v. United States, 418 U.S. 87, 123 (1974).

In sum, the text of §§ 1962(c) and (d) does not require that the defendant knew the loans were illegal, nor does the legislative history indicate that Congress intended such a result or that a "mistake of law" defense should be available. The Court declines to read into RICO what Congress omitted. Unless the predicate offense contains a scienter requirement,⁵⁴ all that RICO requires is that the defendant knew that the loans were issued at a rate above that permitted by 18 U.S.C. § 1961(6) or that Martorello had knowledge of the general illegal nature of the enterprise. Brice v. Haynes Invs., Inc., 548 F. Supp. 3d 882, 894 (N.D. Cal. 2021) (holding that defendants must have "knowledge of the purpose" of the scheme or "knowledge of the terms on which the loans would be provided and repayment required"). In other words, Martorello must knowingly engage in the activity itself, but he does not have to know that, by doing so, he would break the law. The next question

⁵⁴ For example, when pursuing a RICO conspiracy case based on violations of a federal statute prohibiting the knowing hiring of unauthorized aliens, 8 U.S.C. § 1324(a)(3), that knowledge requirement is then imputed to RICO. See Walters v. McMahan, 684 F.3d 435, 440 (4th Cir. 2012).

is whether Virginia's usury statute contains a scienter requirement.

3. Virginia's Usury Statute: Va. Code Ann. § 6.2-303(A)

The underlying Virginia statute, Va. Code Ann. § 6.2-303(A), does not contain a mens rea or scienter requirement. Nor has it been interpreted to contain one. The provision states, in full:

Except as otherwise permitted by law, no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year.

Va. Code Ann. § 6.2-303(A). The statute goes on to clarify that it "shall apply to any person who seeks to evade its application by any device, subterfuge, or pretense whatsoever" followed by a non-exhaustive list of such subterfuges. Va. Code Ann. § 6.2-303(E). The statute provides for only one defense: if the "interest or other charges in excess of those permitted by law were imposed or collected as a result of a bona fide error in computation or similar mistake." Va. Code Ann. § 6.2-305(C).

There is no Virginia decision that addresses whether the current Virginia statute allows for mistake of law defense. But, in 1826, the Supreme Court of Appeals of Virginia interpreted an earlier version of this provision to explicitly exclude a mistake of law defense, stating:

Wherever such intention appears in the taking more than legal interest, it is evidence of the corrupt agreement required by the statute; though the party may never have heard of the law, or may think that he is steering quite

clear of it. Ignorance or mistake of the law excuses no man; but a mistake of fact does excuse.

Childers v. Deane, 4 Rand. 406, 410-11 (Va. 1826) (emphasis added).⁵⁵

Although Childers is an older precedent interpreting an earlier version of the statute, it is in accord with more recent decisions explaining how courts understand the current statute. To make out a claim under Va. Code Ann. §6.2-303(A), plaintiffs need only show that defendants "collected or received payments on loans that violated Virginia's statutory limits." Gibbs v. Stinson, 421 F. Supp. 3d at 309. The elements of the statutory cause of action include no reference to the defendants' intent or knowledge.

Modern caselaw reinforces the fact that a creditor's belief that he is acting in accordance with the law is no defense. For example, the Supreme Court of Virginia invalidated a usurious loan even though the issuing bank believed, presumably in good faith, that it fell under one of the statutory provisions exempting it

⁵⁵ The version of the statute in effect at the time reads: "No person shall, upon any contract, take, directly or indirectly, for loan of any money, wares, or merchandize [sic], or other commodity, above the value of six dollar for the forbearance of one hundred dollars for a year." "An act to reduce into one act, the several acts against Usury" (Feb. 24, 1819) § 1, in Revised Code of the Laws of Virginia: Being a Collection of All Such Acts of the General Assembly, of a Public and Permanent Nature, as are Now in Force, ch. 102, pp. 373-74 (1819).

from the usury laws. Radford v. Cmty. Mortg. & Inv. Corp., 312 S.E.2d 282, 285 (Va. 1984). That, of course, is a mistake of law. In so deciding, the Supreme Court of Virginia reaffirmed that "[t]he [Commonwealth's] usury laws. are to be liberally construed with a view to advance the remedy and suppress the mischief" and the courts "should therefore be chary in permitting this policy to be thwarted." Id.⁵⁶

Looking at the statutory language and the public policy underlying the statute, the Virginia usury statute does not impose a scienter requirement, nor can it be read to allow a mistake of law defense.

⁵⁶ There is one easily distinguishable case finding that the lenders' good-faith belief can excuse a usurious debt. In this case, the debtor and creditor engaged in a complicated loan transaction involving real estate liens, corporate debts, and individuals acting on behalf of themselves and partnerships. Heubusch v. Boone, 192 S.E.2d 783, 787-78 (Va. 1972). On its face, the Supreme Court of Virginia determined that the resulting loan was usurious. Id. at 789. However, the debtors in the case were a lawyer and his law firm and had "induce[d] the lender to enter into a usurious agreement that he would not otherwise have made." Id. at 789-91. As the debtor/lawyers "were the direct causes of the illegality complained of," the debtors were "estopped from profiting by that illegality of their defense" and the loan was deemed valid. Id. at 790. While Heubusch does involve a creditor relying in good faith on the advice of counsel, it is readily distinguishable from Martorello's asserted defense. Martorello relied on his own lawyers' advice, not that of the debtor. Martorello's debtors in no way "induce[d]" him to enter into the loans as in Heubusch. Thus, that decision does not support the availability of a good-faith defense to Virginia Code Ann. § 6.2-303(A) in this case.

C. Summary Judgment: Certain Elements of COUNT TWO

The Plaintiffs' Motion asked for summary judgment on certain elements of the 18 U.S.C. § 1962(c) claim in COUNT TWO (ECF No. 1169, pp. 36-40). In particular, they asked for summary judgment that: (i) "an enterprise existed;" (ii) that "an association-in-fact enterprise existed;" (iii) the loans at issue "constituted 'unlawful debt'" because the interest rates on those loans exceeded 24% (twice the 12% rate permitted by Virginia law; and (iv) "persons associated with the enterprise engaged in the collection of the debt." (ECF No. 1169, pp. 36-40, § VIA-C). However, recognizing that there was a material fact dispute over one element of COUNT TWO, Plaintiffs did not seek summary judgment as to COUNT TWO as a whole.

As explained above, Martorello did not respond to the arguments on those points.⁵⁷ At oral argument on June 7, Martorello's counsel agreed. June 7 Tr. p. 173. Hence, summary judgment on those points (the elements) in Plaintiffs' favor is appropriate.


⁵⁷ Compare PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (ECF No. 1241, pp. 7, 28-30) with DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1218).

CONCLUSION

For the reasons set forth above, the Court granted PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1165) in part and denied in part.

Subsequent orders have taken the matter further so that, as of now, summary judgment has been granted as to COUNTS TWO and THREE and COUNTS FOUR and FIVE have been dismissed without prejudice.⁵⁸ As a result of this MEMORANDUM OPINION and those ORDERS, a final judgment will be entered separately on COUNTS TWO and THREE.

It **is so ORDERED**.

_____/s/ 
Robert E. Payne
Senior United States District Judge

Richmond, Virginia ./.
Date: September 1-V, 2023

⁵⁸ **June 16, 2023 ORDER (ECF No. 1328), as amended by ECF No. 1350; July 7, 2023 ORDER (ECF No. 1373) (granting summary judgment in favor of the Plaintiffs as to COUNT TWO); July 10, 2023 ORDER (ECF No. 1390) (dismissing without prejudice COUNTS FOUR and FIVE).**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

LULA WILLIAMS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 3:17-cv-461 (REP)
)	
BIG PICTURE LOANS, LLC, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

NOTICE OF APPEAL

Defendant Matt Martorello appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered on September 22, 2023.

Dated: October 17, 2023

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)
LOEB & LOEB LLP
901 New York Ave., NW
Suite 300-E
Washington, DC 20001
Tel. (202) 618-5015
Facsimile: (202) 318-0691
jtaliaferro@loeb.com

Bernard R. Given (*pro hac vice*)
LOEB & LOEB LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, CA 90067
Telephone: (310) 282-2348
Facsimile: (310) 742-0414
bgiven@loeb.com

Counsel for Defendant Matt Martorello

CERTIFICATE OF SERVICE

I certify that on this 17th day of October, 2023, a true and correct copy of the foregoing was served upon all parties that are registered to receive electronic service through the Court's ECF notice system in the above case.

/s/ John David Taliaferro
John David Taliaferro (Va. Bar. 71502)